National Defence / Défense nationale

A review from 1 April 2006 to 31 March 2007

ANNUAL REPORT

of the Judge Advocate General to the Minister of National Defence
on the administration of military justice in the Canadian Forces

Office of the Judge Advocate General

Cabinet du juge-avocat général

Canada

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October 2007

The Honourable Peter G. MacKay
Minister of National Defence
National Defence Headquarters
101 Colonel By Drive
Ottawa ON K1A 0K2

Dear Minister,

It is my honour to present to you the eighth Annual Report of the Judge Advocate General on the Administration of Military Justice in the Canadian Forces, made pursuant to section 9.3 of the *National Defence Act*. This Report covers the period 1 April 2006 to 31 March 2007.

Yours truly,

Kenneth W. Watkin, Q.C.
Brigadier-General
Judge Advocate General

The maple leaves framing the badge of the Canadian Forces Legal Branch represent service to Canada, and the Crown, service to the Sovereign. The dark background of the central device signifies the blindfolded figure of justice, and symbolizes the impartiality of the justice system. Against the background the scales of justice are held aloft on a pointless curtana sword by a mailed right hand. The mailed hand represents military justice, while the pointless sword denotes the mercy that we trust prevails in judgement.

The motto "*FIAT JUSTITIA*" means, "*LET JUSTICE PREVAIL*".

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Judge Advocate General Communiqué

One of the principal responsibilities of the Judge Advocate General of the Canadian Forces is to superintend the administration of military justice in the Canadian Forces. The annual preparation and delivery of a report to the Minister of National Defence on the administration of military justice in the Canadian Forces is a key aspect of that superintendence function. As such, it is an honour and a privilege to deliver this, my first annual report, since my appointment as JAG on 14 April 2006.

As recognized by the Supreme Court of Canada, the safety and well being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security.[1] As members of the Canadian Forces continue to conduct operations around the world and in some very hostile environments, the requirement for the military chain of command to be in a position to enforce internal discipline effectively and efficiently is reinforced. The military justice system is an essential tool for maintaining that discipline, a tool that seeks to balance the need for a disciplined force with the rights of CF members to be treated fairly and appropriately. In short the military justice system contributes to ensuring Canada is well prepared to deploy its forces both domestically and in support of international operations.

Superintending the administration of military justice involves more than simply conducting reviews and monitoring the military justice system. It also necessitates the conduct of proactive audits and the close scrutiny of the information gained to ensure meaningful assessments of the functioning of the military justice system can be achieved. For example, the military justice databases that contain case specific information for both summary trials and courts martial are important sources for the statistical data provided in this

[1] *R.* v. *Généreux*, [1992] 1 S.C.R. 259.

report and relied on for conducting the necessary assessments. As well, important information received from the very individuals who use and are affected by the military justice system on the performance of the system as an effective and fair tool for maintaining discipline is also considered. This year, in addition to the annual survey on the summary trial process, the interview survey of stakeholders, which is the source of invaluable input from senior members of the chain of command on the functioning of the military justice system as a whole, was undertaken for the first time in four years.

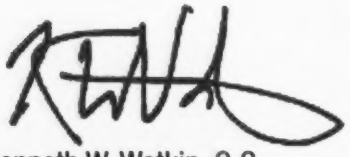
From all the information examined it is evident that the military justice system is functioning very well, and that both the chain of command and the individuals who participate in the system have confidence in it as an effective tool for maintaining discipline amongst CF members. In my view, the Canadian military justice system is second to none in the world, yet with its many strengths, three areas have been identified where enhancements can be made to improve the overall health and effectiveness of the military justice system.

One such area is the timeliness of courts martial. There is no question that the needs of the chain of command are best met when disciplinary matters are addressed as expeditiously, effectively and fairly as possible, and ensuring that courts martial proceed in a timely matter is a challenge that faces the military justice system. Efforts to address timeliness are complicated in large part by the number of actors and processes involved from the time an incident takes place until a court martial is held. Many factors contribute to the overall timeliness of the court martial process, and for that reason a holistic approach is required and is being undertaken to identify ways to make our existing practices and procedures more efficient and timely. Furthermore, the existing processes in the military justice system were developed to ensure fairness for accused; accordingly, the clear need to balance our efforts to improve timeliness with ensuring that fairness is at all times maintained is another complicating factor. Enhancing the timeliness of courts martial is a goal that requires ongoing effort to achieve; these efforts began during the current reporting period and will continue into future periods.

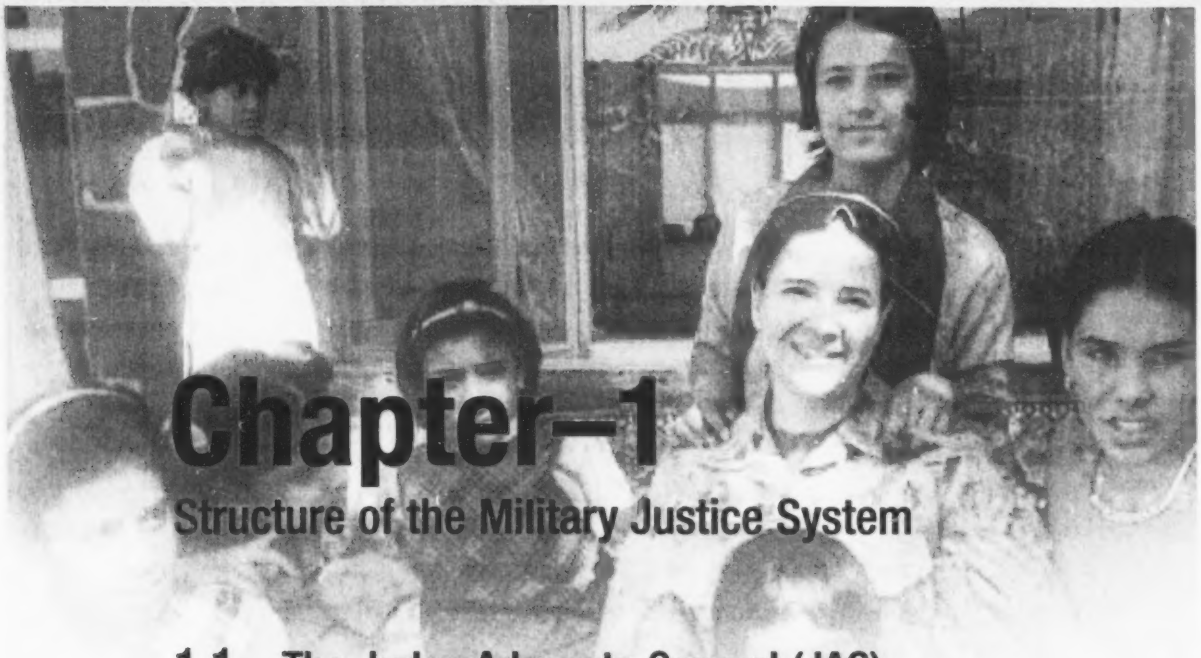
Assisting Officer training is another area on which our efforts need to be focused. Concerns over the sufficiency of the existing levels of assisting officer training are not new and have consistently been raised during recent years, and while efforts have continued within the Office of the JAG to update and expand the available training aides, it is clear that a more comprehensive approach is required. During the upcoming reporting period it is expected that a new Canadian Forces Military Law Centre (CFMLC) will be introduced under the command of the Canadian Defence Academy. The focus of the CFMLC will be the provision of military legal education and training to the CF as a whole, and the development of a comprehensive approach to assisting officer training is an undertaking that the CFMLC will be ideally situated to undertake.

The third area that warrants further consideration and study relates to the number of incidents involving the negligent discharge of a firearm that occurred during the reporting period. Our statistical information shows a notable increase in the number of summary trials held during the reporting period for offences related to the negligent discharge of a firearm as compared to the 2005-2006 period. There are a number of factors that may have resulted in this increase and my office is conducting further analyses of the summary trial statistics and will be providing this information to the chain of command for their consideration.

It is only with the benefit of a well-disciplined force that the CF is able to make the operational contributions that it does both in and outside Canada, and the existence of an effective and well-functioning military justice system is vital to the maintenance of discipline within the CF. There is much to be proud of in relation to the Canadian military justice system, and while no system of justice is perfect, I am confident in the ability of our system to continue meeting the needs of the CF and the Government of Canada.



Kenneth W. Watkin, Q.C.
Brigadier-General
Judge Advocate General



Chapter – 1

Structure of the Military Justice System

1.1 The Judge Advocate General (JAG)

The JAG is the senior legal officer in the Canadian Forces (CF). As provided under the *National Defence Act*, the JAG is appointed by the Governor in Council and serves at pleasure for a renewable term of four years.[1] As part of the statutory mandate, the JAG acts as the legal adviser to the Governor General, the Minister of National Defence (the Minister), the Department of National Defence (DND) and the CF in all matters relating to military law.[2] While the JAG is responsive to the chain of command for the provision of legal services, it is to the Minister that the JAG is responsible for the performance of his duties.[3]

In addition to the legal advisory function, the JAG is also responsible under the NDA to superintend the administration of military justice in the CF.[4] As part of this responsibility, the JAG is statutorily required to conduct regular reviews and report annually to the Minister on the administration of military justice in the CF.[5] This is the report of the JAG to the Minister for the reporting period of 1 April 2006 to 31 March 2007.

[1] R.S.C. 1985, c. N-5 [NDA], sections 9 – 10.1.

[2] Canadian military law comprises three principal disciplines: Military Justice, Operational Law, and Military Administrative Law.

[3] *Supra* note 1 at subsection 9.3(1).

[4] *Ibid.* at subsection 9.2(1).

[5] *Ibid.* at subsections 9.2(2) and 9.3(2).

On the completion of his second term as the JAG, Major-General Jerry S. T. Pitzul, Q.C., retired from the CF on 13 April 2006 after more than 33 years of service. On 11 April 2006, Brigadier-General Kenneth W. Watkin was promoted to his current rank and was appointed as the JAG on 14 April 2006. Brigadier-General Watkin is a member of the Law Society of Newfoundland and has been a legal officer since 1982. He received both his Bachelor of Laws and Master of Laws degrees from Queen's University. During the 2002 – 2003 academic year, he was a Visiting Fellow with the Human Rights Program at Harvard University. Brigadier-General Watkin was appointed Queen's Counsel by the Lieutenant-Governor in Council of the Province of Newfoundland on 15 May 2006.

The position of the JAG within the CF and DND is illustrated in the organizational chart contained at Annex A.

1.2 Office of the JAG

The Office of the JAG is an element of the CF that provides support to the JAG in the performance of his or her duties. The Office is embodied in the regular force of the CF, and the JAG is designated as an officer having the power and jurisdiction of an officer commanding a command.[6]

The JAG exercises command over all officers and non-commissioned members posted to an established position within the Office of the JAG.[7] The duties of the legal officers posted to a position within the Office of the JAG are determined by or under the authority of the JAG and, with respect to the performance of their duties, those legal officers are not subject to the command of any officer who is not a legal officer.[8] For military matters not related to the performance of their duties, legal officers, including the JAG, are subject to the orders and direction of the CF chain of command.

[6] Ministerial Organization Order 96-082 dated 1 August 1996. For the authority relating to command generally, and command of commands specifically, see *Queen's Regulations and Orders for the Canadian Forces* (QR&O), Chapter 3, Section 2 - *Command*, and article 3.21 - *Command of Commands.*

[7] QR&O, article 4.081(2) - *Command of the Office of the Judge Advocate General.*

[8] QR&O, article 4.081(4) - *Command of the Office of the Judge Advocate General.*

1.3 Structure of the Office of the JAG

The Office of the JAG comprises 125 regular force legal officer positions and 62 reserve force legal officer positions, which are located across Canada and abroad. Permanent legal offices are located in Ottawa at the National Defence Headquarters (NDHQ) and with the four operational command headquarters, at select bases in each of the regions in Canada, in Europe and the United States.

Structurally, the office is composed of six sub-organizations: the Canadian Military Prosecution Service, the Defence Counsel Services and four divisions that are headed by Deputy Judge Advocate Generals (DJAG) and include Military Justice and Administrative Law, Operations, Regional Services and Chief of Staff. Each of these divisions provides direct support to the military justice system.

Organization charts outlining the structure of the regular and reserve components of the Office of the JAG are included at Annex B.

The Canadian Military Prosecution Service (CMPS)

The CMPS is headed by the Director of Military Prosecutions (DMP) who is a legal officer appointed by the Minister for a four-year term and is a barrister or advocate with at least 10 years standing at the bar of a province.[9] As provided by the NDA, the DMP is responsible for preferring all charges for trial by courts martial, for the conduct of all prosecutions at courts martial, and for representing the Minister on criminal appeals to the Court Martial Appeal Court of Canada and the Supreme Court of Canada when instructed to do so.[10] In addition to these statutory responsibilities, the DMP is also the legal adviser to the Canadian Forces National Investigation Service (CFNIS), which is a section of the Military Police mandated to investigate serious and/or sensitive service and criminal offences.

[9] *Supra* note 1 at section 165.1. On 17 January 2005, Captain (Navy) Holly MacDougall was appointed DMP.

[10] *Ibid.* at section 165.11.

In exercising prosecutorial discretion to prefer charges and conduct prosecutions, the independence of the DMP is protected by both the institutional structures in the NDA and the common law.[11] In this way, the role of the DMP is analogous to that of a director of public prosecutions in the civilian criminal justice system.

The NDA provides that the DMP acts under the general supervision of the JAG, and that the JAG may issue general instructions or guidelines to the DMP in respect of prosecutions in general or in relation to a particular prosecution.[12] During the reporting year, no such instructions or guidelines were issued.

Annex C of this report contains the annual report of the DMP.[13]

Defence Counsel Services (DCS)

The Director of Defence Counsel Services (DDCS) is an officer appointed by the Minister for a four-year term and is a barrister or advocate with at least 10 years standing at the bar of a province.[14] The DDCS provides, supervises and directs the provision of legal services to accused persons, as defined in regulations.[15]

[11] See *R. v. Balderstone*. (1983), 8 C.C.C. (3d) 532 (Man. C.A.). Leave to appeal to the Supreme Court of Canada refused: see [1983] S.C.C.A.No. 44, 52 N.R. 72. Canadian courts have placed significant legal restrictions on the review of the exercise of prosecutorial discretion. Courts will undertake such reviews only in the clearest case of abuse of process. See e.g. *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372.

[12] *Supra* note 1 at section 165.17. The JAG must give a copy of every such instruction to the Minister. The DMP must ensure that such instructions are made available to the public, except in limited cases where the DMP decides that release to the public of an instruction or guideline would not be in the best interests of the administration of military justice.

[13] This report is made in satisfaction of the DMP's requirement to report annually to the JAG. See QR&O, article 110.11 - *Annual Report.*

[14] *Supra* note 1 at section 249.18. On 1 September 2003, Lieutenant-Colonel Jean-Marie Dugas was appointed DDCS.

[15] See QR&O, article 101.20 - *Duties and Functions of Director of Defence Counsel Services.*

The DDCS is statutorily insulated from other CF and DND authorities for the purpose of protecting the DDCS from potentially inappropriate influence. Legal officers assigned to DCS represent their clients in accordance with DDCS and JAG policies as well as the code of professional conduct of their respective law societies. These safeguards are designed to preserve and enhance the legal and ethical obligations that DCS legal officers owe to their clients. Furthermore, communications with their clients are protected at law by solicitor-client privilege.

The DDCS acts under the general supervision of the JAG who may issue general instructions or guidelines in writing in respect of defence counsel services.[16] The JAG cannot issue instructions or guidelines in respect of a particular defence or court martial. During the reporting year no such general instructions or guidelines were issued.

Annex D of this report contains the annual report of the DDCS.[17]

Deputy Judge Advocate General/ Military Justice and Administrative Law (DJAG/MJ&AL)

DJAG/MJ&AL is responsible for providing DND and CF authorities with legal support in relation to military justice, military administrative law, compensation and benefits and other military personnel matters.

During the reporting period, two notable organizational changes were made within the DJAG/MJ&AL division. The first involved consolidating responsibility for elections, service estates and pensions into the new Directorate of Law/Estates, Pensions & Elections, and the second involved renaming the Directorate of Law/Human Resources as the Directorate of Law/Military

[16] *Supra* note 1 at section 249.2. The DDCS must make any general instructions or guidelines available to the public.

[17] This report is made in satisfaction of the DDCS's requirement to report annually to the JAG. See QR&O, article 101.20(5) – *Duties and functions of Director of Defence Counsel Services.*

Personnel. Accordingly, the DJAG/MJ&AL organization currently comprises the Directorate of Law/Military Justice Policy and Research (DLaw/MJP&R), the Directorate of Law/Military Personnel (DLaw/Mil Per), the Directorate of Law/Administrative Law, the Directorate of Law/Estates, Pensions and Elections, and the Directorate of Law/Compensation and Benefits.

With the support of DLaw/MJP&R, the DJAG/MJ&AL develops and advises the JAG on military justice policy matters, collects and maintains information and statistics related to the military justice system, and provides advice to the Canadian Forces Provost Marshal in relation to professional standards and military police policies and doctrine. The DJAG/MJ&AL is also responsible for conducting reviews of the military justice system in furtherance of the JAG's statutory mandate.

Deputy Judge Advocate General/Operations (DJAG/Ops)

DJAG/Ops is responsible for providing legal support to CF and DND authorities in relation to all matters related to operational law. As indicated in last year's annual report, the DJAG/Ops division has undergone organizational changes, which began during the 2005-2006 period and were completed during this reporting period as a direct response to the comprehensive changes made within the CF as part of CF Transformation.

Dramatic changes in CF Transformation took place during the 2005-2006 period and involved the establishment of new joint organizations to meet the Government of Canada's expectations for relevance, responsiveness and effectiveness. A key element of this transformation was the creation of four new operational commands: Canada Command (Canada COM), Canadian Expeditionary Force Command (CEFCOM), Canadian Special Operations Forces Command (CANSOFCOM) and Canadian Operational Support Command (CANOSCOM).[18]

[18] For further information concerning the new Commands, see:
Canada COM: http://www.canadacom.forces.gc.ca/en/index_e.asp,
CEFCOM: http://www.cefcom.forces.gc.ca/default_e.asp,
CANSOFCOM: http://www.cansofcom.forces.gc.ca/en/index_e.asp, and
CANOSCOM: http://www.canoscom.forces.gc.ca/en/index_e.asp.

The establishment of the new command headquarters necessitated structural changes within the DJAG/Ops division to bolster and re-focus the provision of legal support for CF operations. In particular, dedicated legal officer positions have been assigned to each of the new operational commands: both CANSOFCOM and CANOSCOM have received one legal officer position, and Canada COM and CEFCOM have each received three legal officer positions. As well, the creation of the four operational commands has shifted the focus of the legal support being provided at NDHQ from an operational and strategic blend to strategic level advice. Accordingly, a new directorate has been created within the DJAG/Ops Division, the Directorate of Strategic Legal Analysis (DSLA), which along with the Directorate of Law/Operations (DLaw/Ops) provides strategic level legal support for operations. These two directorates have subsumed the responsibilities of the former Directorate of Law/International, which no longer exists.

Currently, the DJAG/Ops division comprises DLaw/Ops, DSLA, the Directorate of Law/Intelligence and Information Operations, and the legal advisers to the four new operational commands. Through each of the command legal advisers, DJAG/Ops is responsible for providing all legal support relating to military justice matters within the respective commands. In particular, through the CEFCOM legal adviser, DJAG/Ops oversees all legal officers on deployed operations and through them provides legal support to deployed military police and deployed CF formations and units on military justice issues. Members of the military police assigned to the CFNIS receive legal support from the DMP including while participating in operations.

Deputy Judge Advocate General/Regional Services (DJAG/Reg Svcs)

The DJAG/Reg Svcs division comprises the legal offices that are located on selected bases or in areas in each of the regions in Canada (Pacific, Western, Prairie, Central, Eastern and Atlantic) as well as in the United States and Germany.[19]

[19] For particulars, see Annex B.

Through these offices, the DJAG/Reg Svcs is responsible for providing general legal support, including advice on military justice matters, to the chain of command. The regional offices, for example, provide direct legal support to regular and reserve force units, including the military police, in relation to military justice issues including the conduct of investigations, the laying of charges, the disposal of charges at summary trial and the referral of charges to courts martial. Members of the military police assigned to the CFNIS receive legal support from the DMP.

Deputy Judge Advocate General/Chief of Staff (DJAG/COS)

The DJAG/COS division is responsible for providing the necessary support and administrative services to the Office of the JAG including financial, information management, library services and training as well as overseeing all non-legal military and civilian staff in the Office of the JAG. In relation to training, the division comprises the Office of Military Legal Education in Kingston, which provides military legal training for CF members and the Directorate of Law/Training (DLaw/T). Through DLaw/T, DJAG/COS is responsible for developing and delivering military justice training, and in particular, certification and re-certification training for presiding officers.

Chief Warrant Officers (CWOs) and Chief Petty Officers 1st Class (CPO1s) within the Office of the JAG

There are currently nine CWO/CPO1 positions within the Office of the JAG that are located in Ottawa and in each of the regions in Canada. The JAG CWO is located with the Office of the JAG at NDHQ in Ottawa and serves as an information contact between the JAG, the chain of command and non-commissioned members (NCMs) in respect of the administration of military discipline.[20] This position ensures that the Office of the JAG has direct access to the knowledge and experience of senior NCMs of the CF in relation to discipline.

[20] CWO Normand Trépanier was appointed the JAG CWO upon the retirement of CWO Marius Dumont in April 2006.

The remaining CWOs and CPOs are located in each of the regions of Canada and are associated with either the Assistant Judge Advocate General (AJAG) office in each region or a designated Deputy Judge Advocate (DJA) office.[21] The AJAG and DJA CWOs/CPOs perform an important role by maintaining a direct contact with the NCMs situated in their respective regions and provide an invaluable bridge between the local legal office and the senior NCMs in relation to discipline matters.

1.3.1 Deployed Operations

The Office of the JAG continues to deploy legal officers to provide direct legal support to CF operations. During this reporting year, a total of 24 regular force legal officers and two reserve force legal officers were deployed in support of six international operations: Operation ARCHER, Operation ATHENA and Operation ARGUS in Afghanistan; Operation CROCODILE in the Democratic Republic of the Congo; Operation ALTAIR, a naval operation in the Persian Gulf region; and Operation BRONZE in Bosnia-Herzegovina.[22] The number of legal officers deployed in support of operations during the reporting period represents approximately 17% of the regular force positions within the Office of the JAG during the reporting period.

1.4 Office of the DND/CF Legal Adviser (DND/CF LA)

While the JAG is responsible to superintend the administration of military justice and provide advice on all matters relating to military law, the DND/CF LA is responsible to provide legal support to the DND and the CF on all other matters.[23] The Office of the DND/CF LA is a Legal Services Unit of the

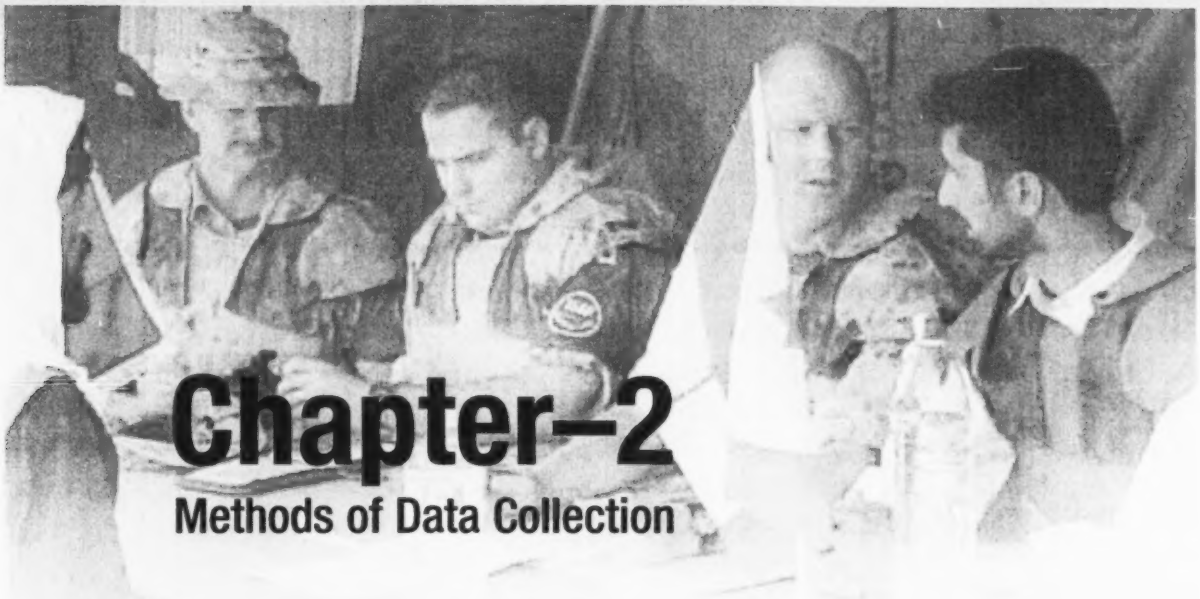
[21] There is an AJAG CWO/CPO1 at the following offices: AJAG Pacific in Esquimalt; AJAG Western in Edmonton; AJAG Prairie in Winnipeg; AJAG Central in Petawawa; AJAG Eastern in Valcartier and AJAG Atlantic in Halifax. The DJA CWO/CPO1 are located in Borden and Gagetown.

[22] Support on Op ALTAIR was continuous throughout the deployment, although a legal officer was co-located with the ship for only part of the operation. Deployed legal support for Op BRONZE in Bosnia-Herzegovina ceased in 2006.

[23] Ms. Oonagh Fitzgerald was appointed the DND/CF LA upon the retirement of Ms. Leslie Holland on 27 March 2007.

Department of Justice, and its staff comprises both civilian lawyers from the Department of Justice as well as military legal officers posted to work within that office.

The Office of the DND/CF LA and the Office of the JAG cooperate to provide seamless legal services to DND and the CF. The drafting and coordination of legislation and regulations relating to military justice is a collaborative effort between the Offices of the DND/CF LA and the JAG.



Chapter–2
Methods of Data Collection

2.1 Introduction

As part of the JAG's statutory responsibility to superintend the administration of military justice in the CF, the JAG is required to conduct regular reviews of the military justice system and to report to the Minister on an annual basis on the administration of military justice.[1] There are two principal methods by which the JAG fulfills these obligations: through the collection of data and compilation of statistics related to both the summary trial and court martial systems and by the conduct of surveys involving selected members of the chain of command as well as individuals who have been involved in the summary trial process. This chapter outlines the different methods of data collection employed during the reporting period.

2.2 Trial Statistics

Summary Trial Database

The summary trial database is used to gather and maintain data related to each charge laid in the military justice system. The information collected in the database comes from the Record of Disciplinary Proceedings (RDP),[2]

[1] *National Defence Act*, R.S.C. 1985, c. N-5 [NDA], sections 9.2 and 9.3.
[2] See *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 107.07 - *Form of Record of Disciplinary Proceedings.*

which is the form used in each discipline matter to lay one or more charges under the NDA and to record how the charges are disposed of. The RDP captures all key pre-trial steps and decisions, the finding at summary trial, the sentence, if applicable, and the results of any review.[3] All RDPs generated by each unit are ultimately forwarded to the Directorate of Law/Military Justice, Policy and Research (DLaw/MJP&R) on a monthly basis.[4] The DLaw/MJP&R is then responsible for entering the relevant information from each RDP into the database.

The information entered in the database is used to generate reports and statistics relevant to the summary trial process, which provide a snapshot of the activity within the summary trial system and allow for the identification of trends and analysis of the state of the system. For example, data is used to compare the number of summary trials held from one reporting period to the next, which assists in assessing confidence in the summary trial system. Similarly, the data can be used to identify trends in the types of offences being charged in the CF.

Annex E contains data pertaining to the 2005-2006 and the 2006-2007 reporting periods and reflects the distribution of service tribunals, demographics (language of trials, commands, and ranks of the accused), summary of charges, dispositions by charge, punishments, and data concerning reviews. Additionally, the Annex provides a comparison of the five most prevalent offences dealt with by summary trial over the last five years.[5]

[3] See QR&O, article 107.14 - *Maintenance of Unit Registry of Disciplinary Proceedings*. Commanding Officers (CO) are obligated to maintain Unit Registries of Disciplinary Proceedings (URDPs) which include copies of RDPs in relation to each charge laid in their unit, applications for referral to courts martial, copies of reports of investigations of service offences and copies of the decisions of reviews of summary trials.

[4] See QR&O, article 107.15 - *Forwarding and Review of Summary Trial Documentation*. By the seventh day of each month, every CO shall forward to the unit legal adviser copies of documents that have been placed on the URDP during the preceding month. Unit legal officers forward copies of the same documents to the DLaw/MJP&R for entry into the Summary Trial Database.

[5] The matters analyzed consist of offences contrary to three sections of the NDA (section 90 - *Absence Without Leave*, section 97 - *Drunkenness*, and section 129 - *Conduct to the Prejudice of Good Order and Discipline*) with further detail concerning four sub-categories under section 129, i.e., offences of a sexual nature, drugs and alcohol, offences for which elections to court martial were given, and offences for which elections were not given.

Court Martial Reporting System (CMRS)

Statistics relating to courts martial are generated using information gathered and retained in the CMRS database. The CMRS is a proprietary database system written and maintained by the JAG Informatics department. The responsibility for entering and ensuring the accuracy of the information contained in the CMRS falls jointly to the Canadian Military Prosecution Service (CMPS) and the DLaw/MJP&R. In particular, CMPS is responsible for opening files in the database when a matter is referred to the Director of Military Prosecutions (DMP) by the chain of command for trial by court martial and for recording other key data such as the date a charge is laid and whether the charge is preferred. Once a matter has been dealt with by court martial, it is the responsibility of the DLaw/MJP&R to enter the trial results in the CMRS in order to complete the record.

The data maintained in the CMRS is used to enable the JAG to monitor the court martial system and identify trends. For example, the CMRS is used to generate statistics to demonstrate the length of time required in each case to complete all the stages leading to the determination of a matter, from the date a charge is laid until a final decision in any court martial or appeal. The statistics for the current reporting period are found in Annex F. This Annex contains data including the number and types of courts martial, demographics, a summary of the charges and the sentences imposed.

2.3 Surveys

Survey on the Summary Trial Process

Since 2000, the Office of the JAG has conducted annual military justice surveys on the summary trial process. The purpose of the surveys is to assess, from the perspective of those who are involved in the summary trial process, how well the process is working and the extent to which the regulations regarding the summary trial process are followed. They target those members who, during the reporting period, have been involved in the summary trial process as commanding officers, presiding officers, assisting officers, charge laying authorities, accused members and review authorities.

In the past, an outside consulting firm was engaged to conduct the survey. This year, the Directorate of Personnel/Applied Research (D Pers AR) at National Defence Headquarters administered the survey on behalf of the Office of the JAG. D Pers AR is part of the Director General Personnel Generation Policy Organization, and its principal role is to provide research services and advice within the CF and DND. Although D Pers AR is an internal DND organization, strict measures were taken to ensure that the survey was conducted independently. While the Office of the JAG assisted in preparing the survey questionnaire to ensure that the data collected was related to the required subject areas, D Pers AR was solely responsible for the administration of the survey and the compilation of the data. The integrity of the survey results has been assured through the application by D Pers AR of scientific methodologies in the collection and analysis of the data. Furthermore, both the content and methodology of the survey were subject to the scrutiny and approval of the Research Review Board, a DND/CF organization, which has quality control and coordination oversight for all DND/CF research. The Board is composed of seven members from D Pers AR and the environmental commands.

Before the survey was launched, the survey questionnaire was reviewed and modified with the assistance of D Pers AR to ensure its continuing high quality and comprehensiveness in regard to all the relevant subject areas. In order to test the questionnaire and ensure the questions posed were both relevant and clear, D Pers AR conducted 14 focus groups consisting of individuals who would be eligible to participate in the survey at seven bases across Canada.[6] The locations were chosen in order to access a representative cross-section of the CF population based on navy, army and air force element affiliation and to allow both linguistic and geographic diversity. In order to encourage free discussion, separate groups were held for members who had been accused and tried at summary trials and those who were otherwise involved in the summary trial process including commanding officers, presiding officers, review authorities, assisting officers and charge laying authorities.

[6] The bases were Esquimalt, Wainwright, Winnipeg, Petawawa, Valcartier, Bagotville and Halifax.

As a result of the comments received from the focus groups, specific questions with respect to the perception of fairness in summary trials were added to the survey.

Participation in the survey was solicited through a CF-wide message sent to all CF units as well as advertising on the Defence Intranet with links to the JAG website. Further, for the purpose of improving awareness and participation, the questionnaire was also provided to the chain of command for direct distribution to those individuals who had been involved in the summary trial process. In addition, members were given the choice to complete the survey electronically or in paper format.

Data collection was carried out during the weeks of 26 February - 23 March 2007. The results of the survey are discussed in chapter 3 and are available on the JAG website.[7]

Interview Survey of Stakeholders

Survey Process

The military justice interview survey of stakeholders involves individual interviews with members of the chain of command who fulfill specific roles within the military justice system. The survey is carried out for the purpose of identifying and discussing systemic issues relevant to the military justice system and provides an appropriate forum for identifying and examining matters that would not be apparent from statistical information. The interview survey was conducted during the reporting period for the first time since the 2001-2002 period.

This year's interview survey was aimed at senior stakeholders within the military justice system at primarily the formation and base commander levels along with formation and base CWOs and chief petty officers 1st class

[7] See: http://www.forces.gc.ca/jag/office/publications/compliance_survey/06-07_e.pdf

(CPO1s). The specific objective focus of this year's survey was to receive feedback from participants in order to:

- determine the level of satisfaction with the military justice system and, in particular, its usefulness as a tool for both establishing and maintaining discipline;
- identify systemic and local concerns related to the military justice system; and
- determine the general level of satisfaction with the legal support provided at the unit level when using the military justice system.

The survey was conducted through personal interviews with individuals from bases and areas in each of the regions in Canada, which were selected to provide a sample from each of the three elements (army, air force and navy) and across linguistic and geographic lines and involved individuals from both the regular and the reserve forces.[8] In total, 24 commander interviews and 17 CWO/CPO1 interviews were conducted from January to March 2007. The commander interviews were conducted by the Director of Law/ Military Justice Policy and Research (DLaw/ MJP&R) and/or the DLaw/MJP&R representative, and the CWO/CPO1 interviews were conducted by the DLaw/MJP&R or the DLaw/MJP&R representative along with the JAG CWO.

The interviews were conducted on the basis of a survey questionnaire that was prepared and provided to all participants in advance of their interview. The questionnaire included 26 questions that related to the following subject areas:

- the military justice system as a whole and its effectiveness in meeting the needs of the chain of command;
- the value of and requirement for military justice training;
- the timeliness of specific military justice processes;

[8] Interviews were conducted with individuals in each of the following locations: Victoria, Edmonton / Wainwright, Winnipeg, Ottawa, Petawawa, Valcartier, Bagotville, and Halifax / Shearwater.

- the court martial system and its effectiveness in meeting the needs of the chain of command;
- the summary trial process and its effectiveness in meeting the needs of the chain of command; and
- the level of satisfaction with the legal support provided in relation to military justice matters.

Results and Analysis

As a whole, the feedback received regarding the functioning of the military justice system was positive; however, specific issues were identified in relation to each subject area. A brief summary and analysis of the general survey results is provided below. The results relevant specifically to the summary trial system are provided in chapter 3 and those relevant to courts martial are contained in chapter 4.

a. **The Military Justice System.** The majority of respondents in both the commander and the CWO/CPO1 groups responded positively about the military justice system and shared the view that as a whole it is meeting the needs of the chain of command. Both groups identified military justice training as one aspect of the system that is working particularly well. Along with the positive comments, a number of concerns relating to the functioning of the system were identified by both groups, including:

   - the timeliness of proceedings, especially for charges dealt with at court martial;
   - the adequacy of the existing powers of punishment and the level of punishments being imposed; and
   - the complexity of the administrative procedures involved in the military justice system.

   The specific concerns expressed about the timeliness of proceedings in the court martial system are addressed in chapter 4. Regarding the issue of timeliness in general, it is necessary that disciplinary matters

in the CF be administered through the military justice system in an effective, expeditious and fair manner. These elements are of equal importance, and the challenge that exists is in maintaining the proper balance among each element. Many of the procedures that currently exist in the military justice system, particularly the pre-trial procedures, were introduced to ensure that accused members are treated fairly. The fulfillment of these procedural requirements take some time and can affect the overall speed by which disciplinary matters can reasonably proceed; accordingly, it is essential that everyone who fulfills a role in the military justice system ensures that the necessary procedures are completed as expeditiously as possible.

The timeliness of proceedings in the military justice system is an issue of particular importance and concern for the JAG not only because fairness for the accused includes avoiding undue delay in the hearing of their matter, but also to ensure that the military justice system continues to meet the disciplinary needs of the chain of command. During the reporting period, the Office of the JAG has initiated reviews into a number of processes within the military justice system, including practices and policies relevant to the provision of legal support on disciplinary matters, for the purpose of identifying ways to increase efficiency and expediency within those processes. It is expected that this review will be completed in the next reporting period.

With regard to the issue of punishment, the scale of punishments that are available in the military justice system is contained in the NDA,[9] and the specific powers of punishment of presiding officers at summary trial are provided for in the QR&O.[10] In the report from the First Independent Review of Bill C-25 (the "Lamer Report"),[11] a number of issues were raised concerning the sentencing provisions contained in the NDA. As a result, amendments to those provisions

[9] *Supra* note 1 at subsection 139(1).

[10] See QR&O articles 108.24 - *Powers of Punishment of a Commanding Officer*, 108.25 - *Powers of Punishment of a Delegated Officer*, and 108.25 - *Powers of Punishment of a Superior Commander.*

were proposed in Bill C-7, *An Act to Amend the National Defence Act*,[12] which is currently before Parliament, for the purpose of enhancing the range and the flexibility of the available sentencing options.

The amendments proposed in the bill include an articulation of the fundamental purpose of sentencing within the military justice system and an enumeration of the relevant objectives and principles of sentencing, which will serve as a guide for presiding officers and judges as to the appropriate considerations to be made in each case when determining sentence. While the specified objectives and principles of sentencing are reflective of the factors currently considered when determining an appropriate sentence, the new provisions explicitly take the fundamental purpose of sentencing in the military justice system into consideration. Accordingly, it is expected that these provisions will be of significant assistance when determining a sentence that is appropriate in the circumstances of each case.

b. **Military Justice Training.** Both groups recognized military justice training as being useful and an aspect of the military justice system that is working particularly well. However, there was a general consensus within both groups that a need exists for providing CF members with additional military justice training and information throughout their careers. A need was also identified for providing role-specific military justice training to officers and non-commissioned members to better prepare them for the specific roles they may be asked to perform. With regard to presiding officer certification training (POCT), respondents agreed that POCT is adequately preparing presiding officers to preside over summary trials;

[11] The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, *An Act to Amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35, was required under section 96 of the Bill. The Lamer Report is discussed in further details in chapter 6 and may be accessed online at: www.forces.gc.ca/site/reports/review/en/report_e.pdf.

[12] 1ST Sess., 39th Parl., 2006.

however, many respondents identified the need to incorporate an element of practical training into the current POCT curriculum.

The JAG is responsible for providing training to and certifying commanding officers, superior commanders and delegated officers in the administration of the Code of Service Discipline (CSD).[13] As a result, POCT was developed by the Office of the JAG and is currently being administered by the Directorate of Law/Training (DLaw/T). While the JAG does not have a specific mandate to provide general training on military justice, the Office of the JAG has published materials and actively supports the chain of command in the conduct of military justice training.[14] In addition, during the reporting period, work was undertaken by the Office of the JAG to produce a manual on disciplinary investigations and charge laying, which is aimed at those members who are directly responsible for performing these tasks at the unit level. It is expected that this manual will be completed during the next reporting period. The Office of the JAG will continue to review the military justice information and training it produces to ensure it remains current and sufficient.

With regard to POCT, the DLaw/T began a review of the current course during the reporting period, and it is expected that the review will be completed and the course revised during the 2007-2008 reporting period. It is expected that a new Canadian Forces Military Law Centre (CFMLC), under the command of the Canadian Defence Academy (CDA), will be introduced during the next reporting period. With its establishment, the revision of the POCT will be continued by the CFMLC.[15] The results from this survey relating to POCT will be taken into consideration by the DLaw/T in the conduct of its review.

[13] See QR&O, articles 101.09 - *Training and Certification of Superior Commanders and Commanding Officers* and subparagraph 108.10 (2)(a)(i) - *Delegation of a Commanding Officer's Powers*. Before superior commanders and commanding officers assume their duties, they shall be trained in the administration of the CSD in accordance with a curriculum established by the JAG and certified by the JAG as qualified to perform their duties in the administration of the CSD.

[14] See chapter 5, Review of Military Justice Education and Training.

c. **Timeliness.** Respondents were asked to provide their views on the timeliness of six specific processes within the military justice system: investigations, access to legal advice on charge laying decisions, the disposal of charges at summary trial, the staffing of referrals for court martial, the disposal of charges at court martial, and post-charge processes. Both groups expressed overall satisfaction with the timeliness of legal advice, the disposal of charges at summary trial and post charge administration. Concerns were raised, however, with the timeliness of the investigative process in relation to investigations conducted by the military police, as well as the timeliness of staffing referrals to court martial and the disposal of charges within the court martial system.

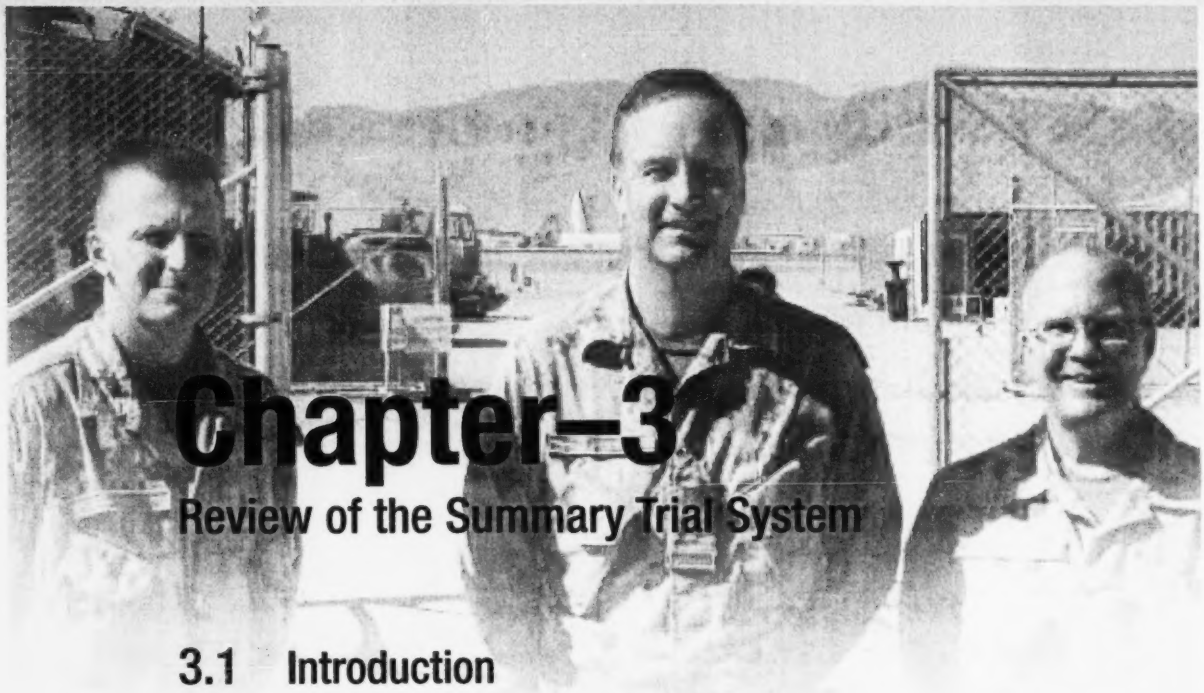
While the military police fulfill a key investigatory and policing role within the military justice system, the JAG is not responsible for the military police or the execution of policing functions within the CF. The Office of the JAG will provide the CF Provost Marshal the survey results that are relevant to the military police. The specific concerns expressed about the timeliness within the court martial system are addressed in chapter 4.

d. **Legal Support.** Virtually all respondents in both groups expressed satisfaction with the level of legal support that is provided in relation to military justice matters. While the level of satisfaction was high, an issue was raised with regard to the level of legal support available when a unit's principal legal adviser is deployed or otherwise tasked away from their regular duties.

As indicated in chapter 1, 24 regular force and two reserve force legal officers were deployed on operations during the reporting period. As well, numerous legal officers were given short-term

[15] See chapter 7, The Way Ahead: Strategic Initiatives.

taskings both in and outside Canada to provide legal support to the chain of command in other capacities including as legal advisers to boards of inquiry. Accordingly, like most other units and elements in the CF, the Office of the JAG faces the continuous challenge of balancing the increasing demand for services with the need to maintain the required level of support for discipline matters.



Chapter–3

Review of the Summary Trial System

3.1 Introduction

The existence of a system of military justice that fosters the rapid, effective and fair disposition of charges is critical to establishing and maintaining a well-disciplined military force. Within the CF military justice system, there are two distinct tribunal structures used for dealing with service offences: the summary trial system,[1] and the more formal court martial system, which will be reviewed in Chapter 4. The summary trial, which is used to deal with the vast majority of disciplinary matters within the military justice system, has two principal purposes: to provide prompt but fair justice in respect of minor service offences, and to contribute to the maintenance of military discipline and efficiency, in Canada and abroad, in time of peace or armed conflict.[2]

This chapter sets out the statistical data collected in relation to summary trials and provides an analysis from the results from the Survey on the Summary Trial Process and the relevant portions of the Interview Survey of Stakeholders.

[1] See generally *National Defence Act*, R.S.C. 1985, c. N-5 [NDA], Part III *Code of Service discipline*, Division 5, *Summary Trials* at sections 162.3 – 164.2, and the *Queen's Regulations and Orders for the Canadian Forces* [QR&O], chapter 108 - *Summary Proceedings*.

[2] QR&O, article 108.02 - *Purpose*.

3.2 Summary Trials conducted during the Reporting Period

Detailed statistics for the summary trials held from 1 April 2006 to 31 March 2007 are provided at Annex E while a number of key statistics are set out below.

During the reporting period, a total of 1660 summary trials were conducted, which constitutes an increase from the 1505 summary trials held during the 2005-2006 reporting period. Notwithstanding this increase, the number of summary trials remains within an expected range of the average number of summary trials conducted during the last five reporting periods, which is 1583. The statistics also show that out of the 1727 disciplinary proceedings held during the reporting period,[3] 493 accused were offered the right to elect trial by court martial, and 38 elected court martial. This figure represents 7.7% of those who were offered a choice, and while this is a slight increase from the 6% who elected court martial during the last reporting period, it matches the percentage of accused who elected trial by court martial during the 2004-2005 period.

The statistics also show that 1135 or 54% of the charges laid during the reporting period, were laid under section 129 of the NDA – Conduct to the Prejudice of Good Order and Discipline, and this figure represents a 8% increase from the 2005-2006 period. It is important to note that for statistical purposes, section 129 of the NDA is divided into four categories: (1) offences of sexual nature, (2) offences related to drug or alcohol, (3) offences where an election to be tried by court martial is given (excluding offences captured by the two first categories), and (4) offences where no election to be tried by court martial is given (excluding offences captured by the two first categories). The increase noted above is largely attributable to a 6% increase in the number of offences charged under section 129 that relate to the fourth category. The offences under section 129 that are placed in this category relate to military training; maintenance of personal equipment, quarters or

[3] This figure includes the total number of summary trials (1660) and courts martial (67) conducted.

workspace; or dress and deportment. This is the first notable increase in the number of these charges during the past four reporting periods, and the Office of the JAG will continue to monitor this increase to determine whether any trends develop.

Of further note relating to the offences charged under section 129, 383 or 23.1% of the summary trials conducted this year involved charges under section 129 in relation to the negligent discharge of a weapon. This figure represents a 40% increase over the number of summary trials held for the same offence during the 2005-2006 reporting period. The statistics also show an increase in the number of summary trials held in an operational theatre for this offence during the 2006/2007 period - 62 trials as compared to 28 in the 2005-2006 reporting period. It is important to note that the percentage of the summary trials held for this offence in an operational setting has also been increasing - 4.4% in 2004-2005, 12.2% in 2005-2006 and 16.2% in the current reporting period.

The increase in the total number of summary trials for the negligent discharge of a weapon is the first notable increase in the overall negligent discharge statistics over the past five reporting periods. There are a number of factors that may have resulted in this increase, including the CF's enhanced operational tempo, increased weapons handling and training by CF members, and perhaps the use of summary trials as a mechanism to deter further negligent discharges. While it is too early to know whether this increase is an anomaly or the beginning of a trend, the Office of the JAG will further analyse the statistics and continue to monitor the numbers during the 2007/2008 period. In addition, both the overall increase, as well as the multi-year increase in negligent discharge offences in the operational setting have been brought to the attention of the chain of command to allow for a broader consideration of possible causal factors and identification of steps that might be taken to address these factors.

3.3 Survey on the Summary Trial Process

Survey Process

This professionally conducted survey constitutes one of the two major military justice survey activities of the reporting period. This year, the Office of the JAG engaged the Directorate of Personnel/Applied Research to conduct a CF-wide survey on the administration of summary trials.[4] This survey was designed to:

- indicate how well CF members and units are complying with the regulations concerning the conduct of summary trials;
- contribute to the growing body of statistical information against which the performance of the military justice system can be measured;
- contribute to the ongoing review of the *National Defence Act* reforms; and
- determine the effect of enhanced military justice training over the past six years.

The survey questionnaire targeted commanding officers (CO) and all other persons who were involved in the summary trial process: accused members, assisting officers, presiding officers, review authorities and charge-laying authorities. The survey was widely advertised throughout the CF and was made available to potential respondents on the Intranet and in paper form from 26 February to 23 March 2007. In total, 727 responses to this year's survey were received. This number represents a decrease of 6% in responses from the 2005–2006 reporting year during which there were 775 responses.

The decrease in responses to this year's survey may be attributable to two key factors. First, as discussed in Chapter 2, focus groups were held at selected bases across Canada between December 2006 and January 2007 for the purpose of obtaining input on the contents of the survey questionnaire. It is possible that members who participated in the focus groups were

[4] The Survey results can be accessed through the following link: http://www.forces.gc.ca/jag/office/publications/compliance_survey/06-07_e.pdf

left with the misunderstanding that their responses would be used as part of the survey results, and therefore, it was not necessary for them to further participate in the survey. Unfortunately, it is not possible to confirm whether this was the case. Focus groups will not be conducted next year, and as a result, this issue should not recur.

The second factor is that the electronic link for obtaining a copy of the survey questionnaire did not function. While other means were available for obtaining the electronic and paper versions of the questionnaire, the problem with the link may have dissuaded some potential respondents from participating in the survey. This issue will be addressed in the next survey.

Survey Results and Analysis

The format of the 2007 survey on the summary trial process was based on versions of the survey questionnaire used in previous years. In the past, changes to the survey format were limited to incremental modifications over the six years that the survey has been conducted in order to compile responses that focus on the same or similar areas of inquiry and to create a historical record of service members' views on these issues. However, a number of changes were made to this year's survey questionnaire in order to obtain additional information about identified areas of concern.

The survey continues to measure adherence to the three tenets of fairness in the summary trial system as detailed below:

Tenet 1: Compliance with regulatory requirements relating to the administration of military justice.

a. COs are certified by the JAG to perform their duties in the administration of the Code of Service Discipline after having successfully completed the Presiding Officer Certification Training (POCT).[5]

[5] QR&O, article 101.09 - *Training and Certification of Superiors Commanders and Commanding Officers.*

b. Each unit maintains a Unit Registry of Disciplinary Proceedings, which contains documents such as: Records of Disciplinary Proceedings, reports of investigation and decisions following the review of a summary trial.[6]

c. Records of Disciplinary Proceedings are completed correctly, including the final disposition of all charges, and submitted for review to the local Assistant Judge Advocate General or Deputy Judge Advocate and ultimately to the JAG.

d. Legal advisers and review authorities give timely feedback.

e. Requests from the public for access to the Unit Registry of Disciplinary Proceedings are handled appropriately.[7]

This year's survey indicates a high degree of compliance among respondents with the regulatory requirements relating to the administration of summary trials. Similarly, survey results imply that COs are complying with the regulations that require that they be qualified as presiding officers and maintain Unit Registries of Disciplinary Proceedings. The survey did disclose, however, that five respondents (one CO, two presiding officers and two review authorities) had not been certified by the JAG in the administration of the Code of Service Discipline. In order to address this situation, additional efforts will be made to verify that all commanding officers, superior commanders and delegated officers are certified prior to performing duties in the administration of the Code of Service Discipline. With regard to the provision of feedback, 83% of the responding COs indicated having received timely feedback from legal advisers.

Tenet 2: Each accused receives fair treatment at summary trial.

a. Trials are held in the official language chosen by the accused.

b. Accused persons who are entitled to elect trial by court martial are given the opportunity and legal support to do so.[8]

[6] *Ibid.* at article 107.14 - *Maintenance of Unit Registry of Disciplinary Proceedings.*
[7] *Ibid.* at article 107.16 - *Public Access to Copies of Records of Disciplinary Proceedings.*

c. Accused persons receive:[9]
   (1) all information identified in the regulations;
   (2) access to the evidence that will be used to support the charge; and
   (3) a list of witnesses who will testify to support the charge.

d. Accused persons are given the opportunity to exercise their right to put their case to the presiding officer before a finding is made.[10]

e. Accused persons are given the opportunity to exercise their right to present evidence of mitigating considerations before sentence is passed. [11]

This year's results again demonstrated substantial compliance in all of these areas, which indicates the measure of fair treatment accorded to accused persons in the summary trial system. For example, of the respondents who were accused persons:

a. 96.3% chose to be tried in their first official language, which is a slight increase from last year's figure.

b. 92.2% of those who were offered an election to be tried by court martial felt they had received sufficient time to consult a lawyer, which is a 14.4% increase from last year. Of the remainder, none requested additional time.

c. 88.8% felt they were given access to all the evidence that was used against them and 84.1% felt they had been informed of all witnesses who testified against them. Both of these figures have increased slightly from last year. These figures are contrasted against the 96.8% of assisting officers who felt that the accused had received all the information that was relied on at his or her summary trial.

[8] *Ibid.* at articles 108.17 - *Election to be Tried by Court Martial*, and 108.18 - *Opportunity to Consult Legal Counsel on Election.*

[9] *Ibid.* at article 108.15 - *Provision of Information to Accused.*

[10] *Ibid.* at article 108.20 - *Procedure.*

[11] *Ibid.*

d. 69.7% indicated that either they or their assisting officer were permitted to question witnesses at their summary trial, which is virtually the same percentage as from last year. In contrast, 93.0% of assisting officers responded that they or the accused were permitted to question each witness.

e. 62.8% of those found guilty at the summary trial responded that there were outside factors that they or their assisting officer asked to be considered by the presiding officer in mitigation of the sentence. This is in contrast to the 87.3% of assisting officers who responded that the presiding officer was asked to consider outside factors in mitigation of sentence.

Unlike in previous surveys, respondents were asked in this year's survey to comment on their perception of the fairness of the system. Responses indicated an overwhelming confidence in the system from all perspectives including that of the accused. When accused members were specifically asked in what ways they felt the summary trial process was fair, the three most common responses were:

a. having access to and being able to review all evidence pertaining to a charge;

b. having different forms of assistance available such as an assisting officer or JAG resources; and

c. the quick turnaround time associated with summary trials.

Respondents were also asked what they felt was unfair in the summary trial process, and their responses addressed three general areas of concern:

a. **Training:** If was felt that assisting officers were not sufficiently trained given the scope of their role, the potential consequences to the accused and the intricacies of the system. Many respondents felt that both practical training in the form of shadowing or mentoring was required, and that formal training specific to assisting officers should be provided.

Concerns over assisting officer training are consistently raised each year in the summary trial process survey, and efforts have continued within the Office of the JAG to provide appropriate relevant training materials for assisting officers. These materials include the *Guide for Accused and Assisting Officers*, which is available on the JAG website[12] and provides accused service members and their assisting officers with a convenient summary of the differences between summary trials and courts martial. As well, a training package for units to conduct their own assisting officer training has also been developed, and is accessible on the JAG website.[13]

As indicated in the 2005-2006 JAG Annual Report, the Code of Service Discipline Committee considered assisting officer training during its meeting on 30 June 2005, and the development of a comprehensive approach that involves enhancing the relevant content of existing in-service training was supported. The existing in-service training would include the military law portion of the Officer Professional Military Education Program and the Intermediate Leadership Qualification training. As has been noted, it is expected that a new Canadian Forces Military Law Centre (CFMLC), under the command of the Canadian Defence Academy (CDA), will be introduced during the next reporting period.[14] Currently, CDA is responsible for the curriculum of the relevant in-service training programs. Once established, the CFMLC will be in an ideal position to develop this more comprehensive approach to assisting officer training.

b. **Bias:** Approximately 9% of all respondents raised actual bias or the perception of bias among presiding officers as a concern related to the fairness of the summary trial process. It is important to note that

[12] The Guide is available at: http://www.forces.gc.ca/jag/training/publications/GuideAccusedAssistingOfficers(Bilingual).pdf.

[13] The presentation is available at: http://www.forces.gc.ca/jag/publications/default_e.asp?VIEW_BY=title.

[14] See chapter 7, The Way Ahead: Strategic Initiatives.

included with these respondents were presiding officers who, while they did not believe that actual bias exists, identified the perception of bias among CF members as a concern that impacts the perception of fairness within the summary trial process.

By their nature, summary trials are a form of service tribunal that permits disciplinary matters to be dealt with, as a general rule, at the unit level. While presiding officers are required to act impartially and separate their personal interests and beliefs from their decision-making powers and duties, presiding officers will always have an interest in the discipline of the unit. The NDA and QR&O set out a number of specific requirements to enhance impartiality at summary trial:

(1) unless it is unavoidable, commanding officers who carry out or supervise an investigation, sign a search warrant or lay or cause a charge to be laid may not preside at the summary trial of the same matter;[15]

(2) at the commencement of every summary trial, all presiding officers are required to take an oath or solemn affirmation to administer justice according to law, without partiality, favour or affection;[16] and

(3) superior authorities are prohibited from intervening in any summary trial.[17]

The training that is provided in relation to bias is a matter that the new CFMLC will be asked to review in the context of both POCT[18] and assisting officer training.

c. **Inconsistency in Sentencing:** respondents indicated concerns regarding a disparity in the sentences given in what appeared to them to be similar circumstances.

[15] *Supra* note 1 at subsection 163(2).
[16] QR&O, article 108.20(2) - *Procedure.*
[17] QR&O, article 108.04 - *Summary Trial – Non-Intervention by Superior Authority.*
[18] See chapter 5.
[19] QR&O, article 108.20, Note F – *Procedure.*

The passing of an appropriate sentence is an essential part of the trial process, and often presents one of the greatest challenges to a presiding officer, and while it is expected that similar cases will be treated similarly, it is not expected that they will be treated the same. There are four generally accepted goals of sentencing: general deterrence; specific deterrence, rehabilitation and reform, and retribution. The weight that is given to each of these goals will depend of the facts of each case. The QR&O set out nine factors to be considered by presiding officers when determining what is an appropriate sentence in a case.[19] These include:

(1) the deterrent effect of the sentence on the offender and other CF members;

(2) the offender's circumstances and previous character;

(3) the degree of pre-meditation and the consequential harm; and

(4) any sentence imposed on a co-accused.

While the circumstances of two offences may appear very similar, other relevant factors such as the offender's personal histories and situations may be very different and thereby justify different sentences. In order to explore options for providing greater guidance to presiding officers, the JAG has given direction that methods for making statistical information on sentencing ranges more readily available to presiding officers be examined.

Tenet 3: The system for reviewing the decisions made at summary trial is fair and responsive.

a. All accused persons are informed of their right to seek review.

b. The review process is efficient.

Previous survey results have indicated a low level of awareness among members convicted at summary trial of their right to seek a review of the findings and the sentence passed by the presiding officer. Attempts to

increase awareness through military justice training and the distribution of CF publications such as the *Code of Service Discipline and Me* and the *Guide for Accused and Assisting Officers* have had limited success.[20] According to the results from this year's survey, 68.3% of responding accused were aware of the right to request a review of the findings and sentence at summary trial, which is approximately a 10% increase from last year's survey.[21] As well, 96.6% of assisting officers indicated that they informed the accused of the ability to request a review. Accordingly, this indicates an increased level of awareness of the right to request a review compared to last year. Upon its establishment, the CFMLC will be asked to explore further training options for the purpose of increasing awareness of the summary trial review process.

The right to seek a review of a finding and sentence at summary trial is an important element of the process and, as such, it will continue to be a significant concern for the Office of the JAG to find ways that will increase the awareness of accused members, commanding officers and presiding officers of this right. The summary trial statistics show that during the reporting period, 22 requests for review were made compared with 36 during the 2005-2006 period. While the cause of this decrease cannot be stated with certainty, when it is considered in light of the reported increase in awareness about the right to request a review, it can be viewed as another indicator of the confidence that CF members have in the summary trial process.

3.4 Interview Survey of Stakeholders

Survey Process

As introduced in chapter 2, the interview survey of stakeholders, which involves personal interviews with members of the chain of command, was conducted during the reporting period. The survey was conducted for the purpose of obtaining feedback on the functioning of the military justice

[20] These publications can be found in PDF at: http://www.forces.gc.ca/jag/training/publications/CSD_ME_e.pdf and http://www.forces.gc.ca/jag/training/publications/GuideAccusedAssistingOfficers(Bilingual).pdf.

[21] In last year's survey, 57.9% of accused respondents said that they were aware of the right to request a review if the findings and decision at summary trial.

system from a representative sample of senior level stakeholders, which for this year's survey comprised primarily commanders at the formation and bases levels and the chief warrant officers (CWOs) and chief petty officers 1st class (CPO1) at the same levels. A total of 24 commander interviews and 17 CWO/CPO1 interviews were conducted. One of the subject areas examined during the survey was the summary trial system and specifically, its effectiveness in meeting the needs of the chain of command.

Survey Results and Analysis

As a whole, the respondents in both groups were quite positive about the summary trial system, and the vast majority of respondents indicated that the summary trial system is meeting the needs of the chain of command in both operational and non-operational settings. Among the specific comments received were that the summary trial is the essence of the military justice system, and that it is a required tool. Some of the positive responses also included comments where improvements could be made in specific areas of the summary trial system.

The most common area of improvement identified by both groups related to training and the need to provide further military justice training for all rank levels. While the majority of the respondents were pleased with the military justice training that is currently being provided, there was a general consensus on the need for providing further military justice training and information to CF members throughout their career. It was also recommended that role-specific training be available to officers and non-commissioned members (NCMs) to better prepare them for the specific roles they may be asked to perform.

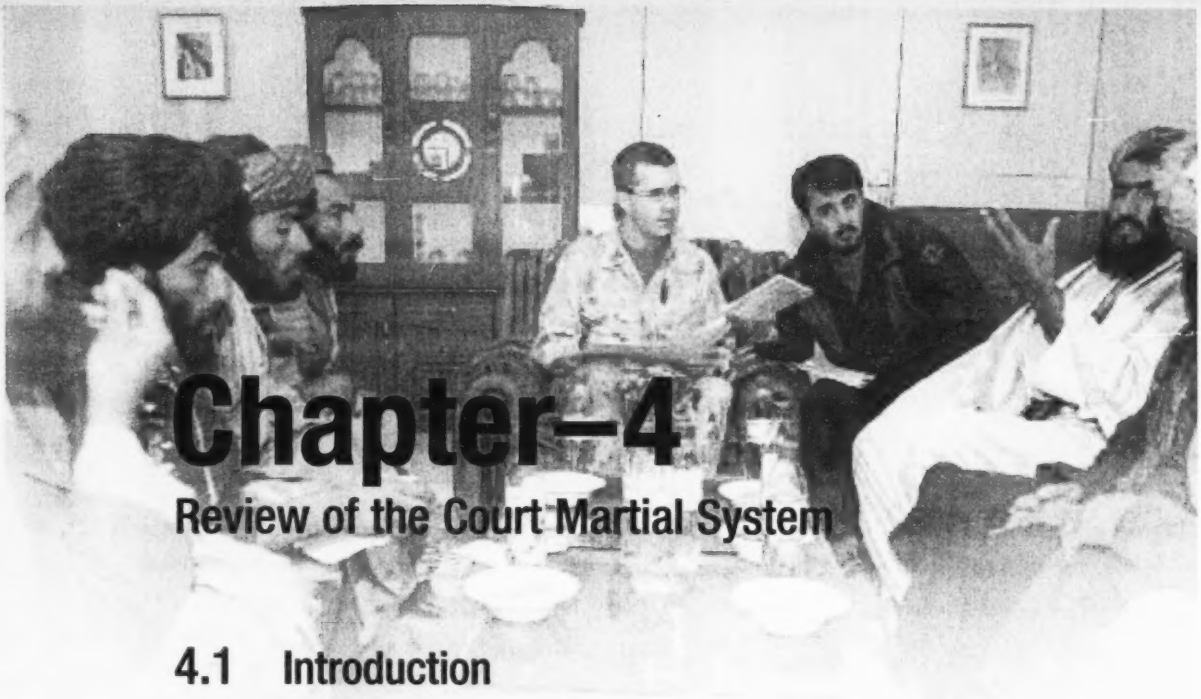
Other than being responsible for providing training to and certifying presiding officers in the administration of the Code of Service Discipline,[22] the JAG does

[22] See QR&O, article 101.09 - *Training and Certification of Superior Commanders and Commanding Officers* and subparagraph 108.10 (2)(a)(i) - *Delegation of a Commanding Officer's Powers*. Before superior commanders and commanding officers assume their duties, they shall be trained in the administration of the CSD in accordance with a curriculum established by the JAG and certified by the JAG as qualified to perform their duties in the administration of the CSD.

not have a specific mandate to provide general training on military justice. Nevertheless, the Office of the JAG actively supports the chain of command in educating members on the military justice system by maintaining military justice publications and conducting formal and informal military justice training.[23] The work undertaken during the reporting period to produce a manual on disciplinary investigations and charge laying, which is aimed at those members who are directly responsible for performing these tasks at the unit level, is one example. It is expected that this manual will be completed during the next reporting period. The Office of the JAG will continue to review on a regular basis the military justice information and training it produces to ensure it remains current and sufficient to meet the needs of the chain of command.

The survey respondents also expressed a concern about the complexity of the current administrative procedures relevant to summary trials, and respondents in both groups recommended that the procedures be made less complicated. The purpose of the summary trial process is to provide prompt but fair justice in respect of minor service offences and to contribute to the maintenance of discipline and efficiency in Canada and abroad, in times of peace or armed conflict.[24] The majority of the procedures that currently exist in relation to the summary trial system were introduced to standardize the process and to better ensure that accused members are treated fairly. The applicable procedures are enumerated in the *Queen's Regulations and Orders* and include explanatory notes.[25] Additionally, the Office of the JAG is actively involved in providing information and advice to the chain of command at all levels to ensure that the applicable procedures are well understood. As referred to above, in addition to conducting training for presiding officers on the administration of military justice, a manual is being produced that will assist members at the unit level with the procedures and requirements relevant to the conduct of investigations and charge laying. The Office of the JAG will continue to provide necessary level of support to the chain of command to ensure the summary trial procedures are clear and understood.

[23] See chapter 5, Review of Military Justice Education and Training.
[24] See QR&O, article 108.02 - *Purpose.*
[25] See QR&O, chapter 108 - *Summary Proceedings.*



Chapter–4

Review of the Court Martial System

4.1 Introduction

The second tier of the military justice system, namely the court martial system, is normally used to deal with the more serious breaches of military discipline. Courts martial are analogous to civilian criminal trials but maintain a distinct military character. Each court martial is composed of a military judge alone or a military judge with a panel of CF members, which performs a function similar to a jury, and is prosecuted by legal officers from the Canadian Military Prosecution Service. In addition, the accused is entitled to representation by either defence counsel from the Director of Defence Counsel Services, at public expense, or by civilian legal counsel at the accused's own expense. This chapter will examine the court martial system during the reporting period.

4.2 Courts Martial held during the Reporting Period

During the reporting period, 67 courts martial were conducted, which represents a 60% increase from the number of trials conducted in 2005-2006. As stated in the Annual Report of the Director of Military Prosecutions (DMP), contained in Annex C, this increase appears to be primarily attributable to the availability of a greater number of military judges during this reporting period compared to last year.[1]

[1] See *infra* paragraph 4.3, *Changes in the Office of the Chief Military Judge.*

Detailed statistics for courts martial conducted during the reporting period from 1 April 2006 to 31 March 2007 are included at Annex F.

4.3 Changes in the Office of the Chief Military Judge (CMJ)

In the military justice system, military judges preside over courts martial and perform other judicial functions as provided under the *National Defence Act*.[2] The Governor in Council may appoint as a military judge an officer of the CF who is a barrister or advocate of at least ten years standing at the bar of any province in Canada.[3] The selection process for military judges is similar to that for other federal judicial appointments.[4]

The Office of the CMJ has seen a number of significant changes during the reporting period. On 11 May 2006, the CMJ, Colonel Kim Carter, retired from the CF. Colonel Carter was succeeded by Colonel Mario Dutil who was promoted to his current rank and appointed CMJ effective 2 June 2006. Further, two additional military judges were appointed during that timeframe. Lieutenant-Colonel Louis-Vincent d'Auteuil was appointed as a member of the military judiciary on 18 May 2006 while Lieutenant-Colonel Jean-Guy Perron was appointed on 2 June 2006, bringing the total number of military judges to their establishment limit of four.

4.4 Appeals

Under the NDA, decisions made by courts martial can be subject to two levels of appellate review. The first level of appeal is to the Court Martial Appeal Court of Canada (CMAC). The CMAC is authorized under the NDA to consider appeals brought by either the Minister or an individual who is subject to the

[2] See generally R.S.C. 1985, c. N-5 [NDA], sections. 165.21 – 165.27.

[3] For appointment; security of tenure and removal; re-appointment; and retirement age, see NDA section 165.21. For remuneration, see NDA section 165.22.

[4] The process is performed by the Military Judges Selection Committee. The five members of this Committee are appointed by Ministerial Order for a term of five years and are from the bench, the public and the military.

Code of Service Discipline, in relation to those matters specified in the NDA.[5] The second level of appeal is to the Supreme Court of Canada (SCC). A decision of the CMAC can be appealed to the SCC by either the Minister or an individual subject to the Code of Service Discipline, in the circumstances set out in section 245 of the NDA. During the reporting period, three appeals were heard by the CMAC with the matters of *R. v. Parsons*[6] and *R. v. Dunphy*[7] being heard together. These cases are discussed below. As well, during the reporting period, an appeal that had been commenced during the last reporting period was abandoned by the appellant, and eight other appeals were commenced but not heard. No appeals were made to the SCC during this period.

As mentioned above, an appellant may be represented at public expense by defence counsel from the Defence Counsel Services. It is the Appeal Committee that is responsible for determining whether an appellant will be provided representation at public expense. As was reported in the 2005-2006 JAG Annual Report, several recommendations had been made in the First Independent Review of Bill C-25 (the "Lamer Report")[8] to improve the functioning of the Appeal Committee, and that those recommendations would be implemented in regulations.[9] Bill C-7, *An Act to Amend the National Defence Act*,[10] includes a provision that sets out the power to establish, by regulations, the appeal committee and its functioning. Bill C-7 is still before Parliament and has not yet been passed into law.[11]

[5] See NDA sections 230 and 230.1.

[6] [2006] CMAC-492.

[7] [2006] CMAC-491.

[8] The First Independent Review by the Right Honourable Antonio Lamer P.C., C.C., C.D. of the provisions and operation of Bill C-25, *An Act to Amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35, was required under section 96 of the Bill. The Lamer Report is discussed in further details in chapter 6 and may be accessed online at: www.forces.gc.ca/site/reports/review/en/report_e.pdf.

[9] See page 43, 2005-2006 JAG Annual Report at: http://www.forces.gc.ca/jag/office/publications/annual_reports/2006annualreport_e.pdf.

[10] 1st Sess., 39th Parl., 2006, section 76.

[11] The purpose and status of Bill C-7 is discussed in greater details in chapter 6, Legislative, Regulatory and Policy Initiatives.

Corporal M.J. Ballard v. Her Majesty the Queen (Cpl Ballard)[12]

Cpl Ballard was tried and convicted by Standing Court Martial in June 2005 of two counts of trafficking in marijuana and one count of trafficking in ecstasy. Cpl Ballard was acquitted of an additional count of conduct to the prejudice of good order and discipline on the basis that the prosecution failed to establish a *prima facie* case against him. Cpl Ballard appealed the legality of his convictions on two grounds. First, he challenged the military judge's findings on credibility. On this ground, the CMAC found that the military judge did not make any palpable and overriding error that would justify the court interfering with his decision.

Second, Cpl Ballard asserted that the military judge failed to deal with relevant evidence or that he misapprehended relevant evidence. The CMAC held that the military judge did not misapprehend the evidence and it was not persuaded that the military judge reached an unreasonable verdict. The CMAC dismissed the appeal.

Master Corporal W.B. Dunphy v. Her Majesty the Queen, Corporal Parsons D.R.v. Her Majesty the Queen (Cpl Dunphy and Cpl Parsons)[13]

Cpl Parsons was tried by Standing Court Martial, which was completed on 03 February 2006, on charges of stealing and of unauthorized possession of public property. During the trial, an application was made pursuant to the *Canadian Charter of Rights and Freedoms*[14] alleging that the renewable five-year term appointments for military judges undermined the independence of the tribunal.

In deciding the application, the military judge held that the relevant provisions of the NDA providing for a renewal process complied with section 11(d) of the *Charter*, which guarantees the right to be tried by a fair and independent tribunal. However, the court found that subsections 101.15(2), 101.15(3)

[12] [2006] CMAC-489.

[13] *Supra* notes 6 and 7.

[14] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

and 101.17(2) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) setting out the renewal committee process were not compliant with subsection 11(d) of the *Charter*. The trial continued with the military judge convicting Cpl Parsons based, at least in part, on evidence provided by Cpl Parsons when the military judge recalled him after the defence case had been closed.

Cpl Parsons appealed his conviction, arguing that the military judge erred in recalling him as a witness and in finding that the provisions of the NDA relating to judicial renewal were constitutionally valid. The Crown cross-appealed on the question of the constitutionality of the QR&O provisions relating to the renewal committee.

MCpl Dunphy was also tried in early 2006 but on charges of using provoking gestures and drunkenness. Prior to the commencement of his trial, he made a pre-trial application in identical terms to that made by Cpl Parsons. In deciding the application, the Military Judge adopted the findings and reasons provided in the Parsons case. MCpl Dunphy was found guilty of both charges and appealed on the constitutionality issue. The Crown again cross-appealed on the constitutionality of the QR&O provisions.

In its joint decision, the CMAC entered a stay of proceedings against Cpl Parsons on the basis that the military judge erred in recalling Cpl Parsons as a witness, and it dismissed MCpl Dunphy's appeal. The CMAC adopted the Military Judge's reasons with respect to the constitutional question relating to the judicial renewal process, thereby dismissing the Crown's cross-appeal.

While this decision upheld the constitutionality of renewable fixed term appointments for military judges, it has determined that the regulatory regime underpinning the renewal process in the military justice system is constitutionally deficient. In effect, it will be necessary to amend the relevant QR&O articles to address the deficiencies before the Renewal Committee is required to consider any future renewal applications.

4.5 Federal Court of Canada (FCC) Judicial Review

During the reporting period, there was one case relevant to military justice that involved an application for judicial review to the FCC. Pursuant to section 18.1 of the *Federal Courts Act*,[15] an application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

In September 2005, charges were preferred against a CF member in relation to an alleged offence that occurred during an on-going operation. Pursuant to the CF security policy, the charge sheet submitted to the Court Martial Administrator (CMA) in this case was classified "SECRET" in order to protect information regarding the identity of the accused, the complainant as well as the location of the alleged offences. Upon receiving the charge sheet, however, the CMJ refused to assign a military judge to preside over the matter on the basis that to do so would be inconsistent with the principle of openness in the military justice system. As a result, the CMA refused to convene a court martial.

The DMP applied to the FCC on 31 October 2005 for judicial review of the respective decisions in this matter by the CMJ and the CMA. In her application, the DMP sought writs of *mandamus* to compel the CMJ to assign a military judge and the CMA to convene a court martial.

In its decision issued on 21 December 2006, the FCC dismissed both applications and held that the DMP had failed to establish two elements of the legal test to obtain the orders sought. First, the Court held that the DMP failed to establish that the CMJ had a public duty to assign a military judge in the absence of a judicial determination that the charge sheets be kept confidential. The Court considered that allowing a court martial to commence "without a full consideration of the issuance of a classified convening order… offended the presumption of openness of court proceedings" according to its interpretation of the SCC jurisprudence. Second, the Court held that in the absence of the orders sought, the DMP had other adequate remedies

[15] R.S.C., 1985, c. F-7.

available to her such as using administrative means to remove the member from his unit or seeking an accommodation with respect to the operation of the CF security policy.

On 22 January 2007, counsel for the DMP filed a Notice of Appeal in the Federal Court of Appeal to set aside the FCC's decisions and seeking orders to compel the CMJ to assign a military judge and to compel the CMA to convene a court martial. The Court has not yet set down the matter for hearing.

4.6 Interview Survey of Stakeholders

Survey Process

As introduced in chapter 2, the interview survey of stakeholders, which involves personal interviews with members of the chain of command, was conducted during the reporting period. The survey was conducted for the purpose of obtaining feedback on the functioning of the military justice system from a representative sample of senior level stakeholders, which for this year's survey comprised primarily commanders at the formation and base levels and the chief warrant officers (CWOs) and chief petty officers 1st class (CPO1) at the same levels. A total of 24 commander interviews and 17 CWO/CPO1 interviews were conducted. One of the subject areas examined during the survey was the effectiveness of the court martial system in meeting the needs of the chain of command.

Survey Results and Analysis

Approximately half of all participants shared the view that the court martial system is meeting the needs of the chain of command with several respondents expressly recognizing the importance of having courts martial as part of the military justice system. It is important to note that the majority of participants identified specific aspects of the court martial system where improvements could be made. The most common issues identified by both groups related to the time required for matters to be dealt with by court

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Approximately half of all participants shared the view that the court martial system is meeting the needs of the chain of command with several respondents expressly recognizing the importance of having courts martial as part of the military justice system. It is important to note that the majority of participants identified specific aspects of the court martial system where improvements could be made. The most common issues identified by both groups related to the time required for matters to be dealt with by court

martial, which was viewed as too long, and the level of punishment being imposed at court martial. It was principally on the basis of these two concerns that some respondents expressed doubt as to whether the court martial system is meeting the needs of the chain of command.

Court martial delay is an issue of great importance to the Office of the JAG, and it is a complicated issue to address because, in relation to each matter, there are numerous actors at various levels who perform functions within the military justice system from the time the incident occurs and a charge is laid until the court martial is held. The issue is further complicated by the need to ensure that accused members are treated fairly throughout the process, which includes during the pre-trial procedures and at court martial. Accordingly, the appropriate balance must be found to enable matters to proceed throughout the process expeditiously while following all the necessary procedures to ensure fairness.

The increase made during the reporting period to the number of military judges available to preside at court martial has had a significant impact on the capacity of the court martial system. As a result, the number of courts martial conducted during the reporting period has been re-aligned with the average number conducted during the reporting periods from 2001-2002 to 2004-2005. As identified in last year's Annual Report, there was a reduced capacity in the court martial system during the 2005-2006 period, and this reduction lead to an increase in the backlog of unheard cases. The Office of the JAG will continue to monitor the effect the increase in the number of military judges will have on reducing the backlog of cases and the timeliness of courts martial over the longer term.

To specifically address the issue of timeliness, during the reporting period the Office of the JAG commenced reviews into certain general and court martial specific processes for the purpose of identifying ways to increase efficiency and expediency. These reviews include an examination of the policies and practices within the Office of the JAG relevant to the provision of legal support in relation to military justice matters. It is expected that these

reviews will be completed during the next reporting period. As well, a new military justice committee focused on the review and study of issues related to the administration of the military justice system was introduced during the reporting period. This Administration of Military Justice Committee will be co-chaired by the JAG and the Chief Military Judge, and its primary objective will be to identify and propose solutions to systemic problems. The issue of court martial delay is one that the committee is expected to examine.

With respect to sentencing at court martial, the military judge who presides at a court martial is solely responsible for determining the appropriate sentence in consideration of the applicable law and the circumstances of the case. Currently, no statutory and regulatory guidance is available as to the appropriate considerations to be taken within the context of the military justice system to assist in determining what would be an appropriate sentence. Amendments to the sentencing provisions of the NDA have been proposed through into Bill C-7[16], which was introduced in Parliament during the reporting period. In addition to enhancing the range and flexibility of the available sentencing options, the proposed amendments will also articulate the fundamental purpose of sentencing for the military justice system along with the objectives and principals of sentencing. While the enunciated objectives and principles are similar to those that have been set out for the criminal justice system in the *Criminal Code*[17], they are not identical and reflect the distinct context and needs of the military justice system. When Bill C-7 is passed into law, it is expected that these provisions will be of significant assistance when determining the appropriate sentence in each case.

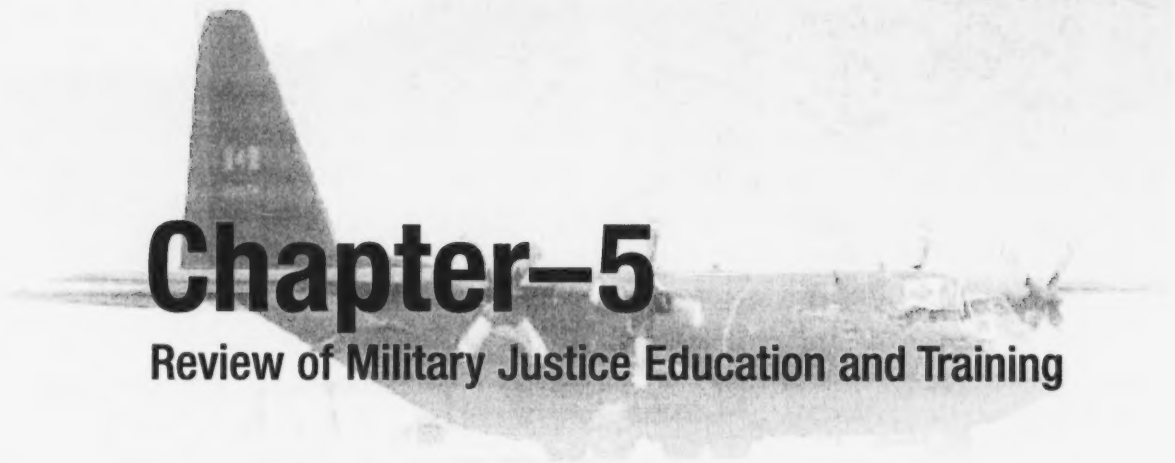
A further issue raised by survey respondents relates to the number of offences for which an accused member has the right to elect trial by court martial. It was expressed that the right is too broad, which in turn increases the demand on the court martial system and adds to court martial delay. As discussed in chapter 3, of the 484 accused who were given the right to elect trial by court martial during the reporting period, only 39 accused elected trial court martial, which is not viewed as excessive. Further, in the Lamer

[16] *Supra* note 10.
[17] R.S.C. 1985, c. C-46.

Report,[18] former Chief Justice Antonio Lamer considered a recommendation advanced by the Office of the JAG to expand the types of offences under section 129 of the NDA that would not require an automatic right to elect court martial. Former Chief Justice Lamer did not support this suggestion and specifically recommended against expanding the offences that do not require an automatic right to elect court martial under any section of the NDA. This matter has been given further consideration in light of Former Chief Justice Lamer's remarks, and the Office of JAG fully supports the recommendation made by Former Chief Justice Lamer.

As a final point, the survey respondents were asked to provide their views about conducting courts martial in operational settings, and whether it is preferable for matters to be referred back to Canada for trial. The responses provided were evenly divided among support for holding courts martial in operational settings, support for returning matters to Canada, and support for weighing relevant factors in each case. The factors identified for consideration when determining where a court martial would be held included the operational tempo, the operational imperatives, the ability to deal with the matter in a timely manner, and what is required to create the necessary deterrent effect. The decision on where a court martial will be held is made by the DMP taking into consideration the expressed wishes of the chain of command. The survey results relevant to the location of courts martial will be forwarded to DMP for consideration.

[18] *Supra* note 8.



Chapter–5

Review of Military Justice Education and Training

5.1 Introduction

The Office of the JAG helps to provide military justice training to the CF community at all levels. This military justice information and training provided by the Office of the JAG is aimed at three groups. The first group comprises the CF community as a whole so that all CF members have access to information about their rights and obligations under the Code of Service Discipline (CSD). The second group comprises those CF members who fulfill specific roles in administering the summary trial process, such as commanding officers and presiding officers, who require military justice training tailored to those roles. The third group comprises legal officers who require specific training on military law based on both their rank and progression within the legal branch.

5.2 General CF Training and Education

It is important that all members of the CF have a level of knowledge about the military justice system, including their rights and obligations under the CSD. While the JAG is not mandated to provide general training on military justice, the Office of the JAG, through primarily the legal officers and chief warrant officers/chief petty officers 1st class (CWOs/CPO1s) in the regional legal offices, provides direct support to the chain of command with regard to such training.

During the reporting year, both legal officers and the Assistant Judge Advocate General (AJAG) and Deputy Judge Advocate (DJA) CWOs/CPO1s were actively involved with providing direct support for military justice training. At the basic training level, instruction was given on the rights and obligations under the CSD to officer cadets who were undergoing their preparatory year prior to attending the Royal Military College. As well, during formal leadership training at the CF Leadership and Recruit School, legal officers and an AJAG CWO/CPO1 provided support by leading discussions and responding to questions on military justice. Legal officers also provided considerable support to the military law course of the Officer Professional Military Education Program (OPME). The OPME program includes courses on defence management, Canadian military history, leadership and ethics and military law. The successful completion of the program is required for officers to be promoted to the rank of major or lieutenant-commander. Each OPME course is delivered either through distance learning or during on-site serials that are conducted at different locales throughout the year. The military law course of the OPME has undergone a major review during the reporting year. This review resulted in the augmentation of the portion that deals with assisting officers, more specifically, who can be an assisting officer, when an assisting officer is assigned and the roles and duties of an assisting officer. During the reporting period, legal officers provided instruction on military law, which includes a segment on military justice, during 22 on-site OPME serials conducted in Esquimalt, Edmonton, Wainwright, Shilo, Borden, Petawawa, Ottawa, Kingston, St Jean-sur-Richelieu, Valcartier, Gagetown and Halifax.

As well, throughout the reporting period legal officers and AJAG and DJA CWOs/CPO1s responded to requests by the chain of command in each of the regions to provide instruction on military justice topics during established courses and training sessions and to also give less formal presentations on military justice and the CSD.

5.3 Training for the Administration of the Summary Trial System

Presiding Officer Certification Training (POCT)

The JAG is responsible to provide training and certify superior commanders, commanding officers and delegated officers in the administration of the CSD at the summary trial level.[1] The POCT was specifically designed to meet this requirement, and as such, it provides candidates with the tools necessary to discharge their duties in the administration of the CSD. During the reporting period, over 820 CF members were certified through these courses.

While POCT is primarily intended for the training of prospective presiding officers, this training is also beneficial to senior non-commissioned members who perform key roles in the maintenance of discipline within their units. During the reporting period, legal officers conducted 57 two-day POCT courses at 25 locations across and outside of Canada. Of these courses, 51 were conducted in English and six in French. For the benefit of reserve force personnel, 10 courses were conducted on weekends. It should be noted that deployed legal officers also conducted four POCT courses overseas for CF personnel while engaged in international operations.

Presiding Officer Re-Certification Test (PORT)

POCT certifications are valid for four years from the date of successful completion of the training. At the end of this period, re-certification may be achieved by either attending another POCT course or by completing the PORT.

The PORT is a randomly generated, 90-minute online test that was launched in October 2003. Re-certification is achieved by successfully completing this test. Should a candidate receive a failing grade after attempting the online

[1] See QR&O, articles 101.09 *Training and Certification of Superior Commanders and Commanding Officers* and 108.10 (2)(a)(i) *Delegation of a Commanding Officer's Powers*. Before superior commanders and commanding officers assume their duties, they shall be trained in the administration of the CSD in accordance with a curriculum established by the JAG and certified by the JAG as qualified to perform their duties in the administration of the CSD.

PORT, the officer is given the opportunity to rewrite the test after a suitable time delay. In the event of a second failure, the officer is then required to attend another two-day POCT course in order to be re-certified. During the reporting year, 268 members were re-certified by means of the PORT.

Some officers choose to be re-certified as presiding officers by re-attending the two-day POCT course. This option is favoured by those officers who may not have performed presiding officer duties often or at all during the preceding four-year period.

5.4 Military Justice Legal Officer Training

Entry Level Training

Lawyers rarely have the opportunity to study military law at law school and never during bar admission courses. Therefore, to prepare them for their duties, all new legal officers must undergo a rigorous training program that includes self-study courses, in-class training, and on-the-job training. This training program was carefully designed to provide instruction in each of the three pillars of military law (military justice, military administrative law and operational law). With regard to military justice in particular, all legal officers at this stage are required to successfully complete the POCT, undergo a self-study program on military justice, which is followed by an online test, and to act as junior counsel in the prosecution or defence of an accused at court martial. Ten legal officers received this training during the 2006-2007 reporting period.

Approximately six months to one year after the completion of the above basic level training components, new legal officers must take a one-week intermediate level military justice course. Eleven legal officers successfully completed this course during the reporting period.

Continuing Legal Education

In addition to the entry-level training, the Office of the JAG actively promotes continuing legal education and, through the Directorate of Law/Training,

provides the necessary funding for legal officers to attend courses, conferences, seminars and symposia relevant to the three pillars of military law. During the reporting period, legal officers participated in supplemental training and education programs relevant to military justice, including courses on criminal law and advocacy training. Specifically, in July 2006, 14 legal officers attended the 2006 Federation of Law Societies National Criminal Law Program in Saint John, N.B.

Additionally, in October 2006, the National Military Law Section of the Canadian Bar Association (CBA) conducted its annual section meeting in Ottawa. The meeting was well attended by both military and civilian lawyers who share a general interest in military law. Each year, following the CBA National Military Law Section meeting, the Office of the JAG conducts a two-and-a-half day continuing legal education workshop. While the themes of the workshops change from year to year, military justice issues are always allocated time on the workshop timetable. The military justice portion of this year's workshop focused on the current legislative initiatives and the issue of delay within the military justice system.

5.5 Military Justice Publications

In addition to providing instruction on courses and training relevant to military justice, the Office of the JAG is also involved with disseminating information related to military justice through the production of the following publications and training aids:

- *Military Justice at the Summary Trial Level*, which is the main source of information on the summary trial process;[2]
- *Guide for Accused and Assisting Officers*, which provides a source of information to accused members and assisting officers when determining whether to elect to be tried by court martial or summary trial;[3]

[2] http://www.forces.gc.ca/jag/training/publications/POCTManual_e.asp.
[3] http://www.forces.gc.ca/jag/training/publications/GuideAccusedAssistingOfficers (Bilingual).pdf

- *The Code of Service Discipline and Me*, which provides members with information regarding the CSD, its application and its effect on members;[4]
- *Investigating and Charging*, which assists those who investigate or lay charges under the CSD;[5] and
- *Guide For Referral Authorities*, which provides a reference to referral authorities dealing with an application for disposal of charges.[6]

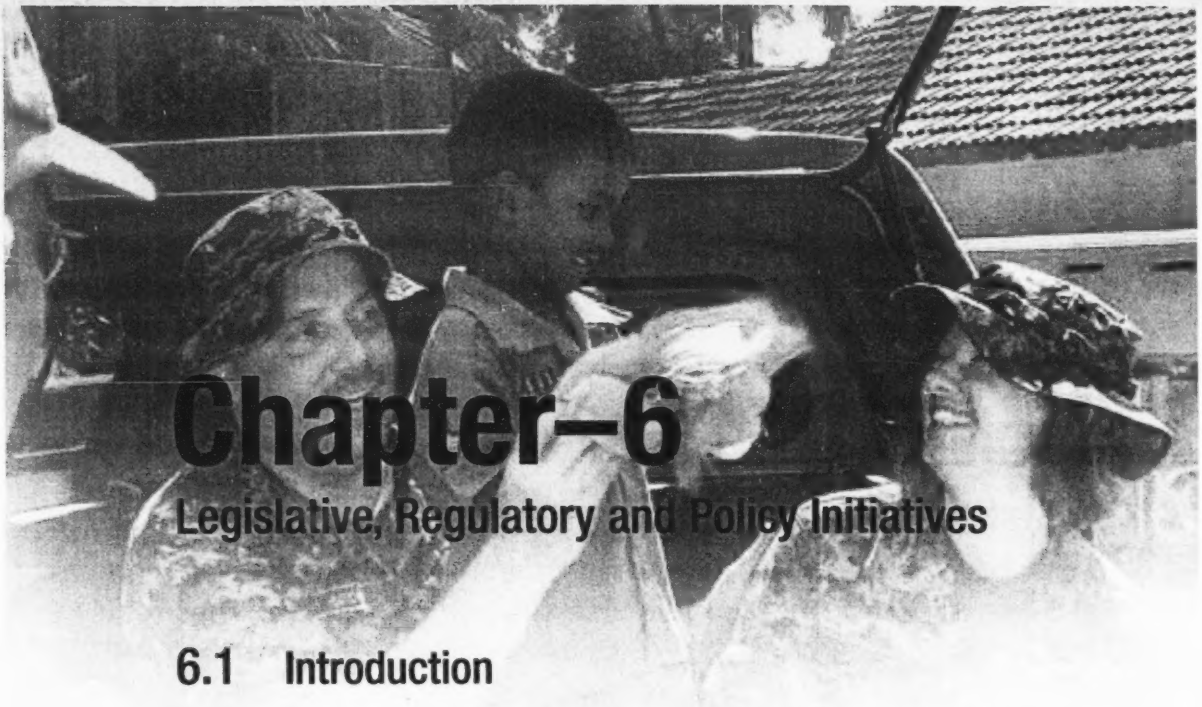
All of these training aids and publications are distributed at CF bases as well as during military justice instructional periods and are available online from the JAG websites on the Intranet and the Internet. These publications and information guides are reviewed on a regular basis and are revised as required. No revisions were completed during this reporting period.

5.6 Foreign Delegation Visits

The Office of the JAG was called upon to host two foreign delegations for the purpose of sharing information about the Canadian system of military law. A French Army delegation visited from 16 to 18 January 2007, to fulfill a task given by their Minister of National Defence to study foreign military law systems. During their visit, the delegation was briefed on the organization and structure of the Office of the JAG, including the career development of CF legal officers, and on the implementation of military law within the CF.

A second delegation, from the Indonesian military justice system, visited from 19 to 20 March 2007. Their goal was to obtain sufficient information about the Canadian military justice system to conduct a comparative study between the Indonesian and Canadian military justice systems. They were briefed on the Canadian legal system, how the Canadian military justice system functions, and the roles performed by the key organizations in the military justice system.

[4] http://www.forces.gc.ca/jag/training/publications/CSD_ME_e.pdf.
[5] http://www.forces.gc.ca/jag/training/publications/charging_and_investigating_e.pdf.
[6] http://www.forces.gc.ca/jag/training/publications/ReferralAuthorities_b.pdf.



Chapter–6

Legislative, Regulatory and Policy Initiatives

6.1 Introduction

In addition to the mandate to superintend the administration of military justice in the CF, the JAG is responsible to provide support to the Minister and the CF in relation to legislation, regulations and policies related to military justice. This responsibility involves identifying and developing policies as required for the enhancement of the military justice system as well as providing direct support for all legislative and regulatory initiatives relevant to the military justice system. This chapter highlights the legislative, regulatory and policy initiatives that have been advanced during the reporting period.

6.2 Legislative Amendments

Bill S-3, *An Act to Amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act and the Criminal Records Act*[1]

On 15 December 2004, the *Sex Offender Information Registration Act*[2] (SOIRA) came into force along with changes to the *Criminal Code*[3] (CC) that allowed courts to order offenders convicted of designated sexual offences to report and register on the National Sex Offender Registry. However, these amendments did not incorporate similar changes to the *National Defence Act* (NDA).[4]

[1] S.C. 2007, c. 5.
[2] R.S.C. 2004, c. C-10.
[3] R.S.C. 1985, c. C-46.
[4] R.S.C. 1985, c. N-5.

On 25 April 2006, Bill S-3 was introduced in the Senate to mirror the provisions contained in the CC in relation to the SOIRA. The proposed amendments would allow courts martial to order an offender convicted of a designated sexual offence to register in accordance with the SOIRA scheme. Bill S-3 also proposed further amendments to the CC and the SOIRA to enhance the administration and enforcement of the current registration scheme. During the legislative process, Bill S-3 was amended by the Senate to address concerns about the authorities provided to the Chief of the Defence Staff and the level of oversight in place relating to the exercise of those authorities. The Bill was ultimately passed in the House of Commons and given Royal Assent on 29 March 2007. The amendments introduced in Bill S-3 will be proclaimed into force at a date to be determined by the Governor in Council.

Bill C-7, *An Act to Amend the National Defence Act*[5]

In 1998, significant amendments were made to the NDA through the passing of Bill C-25, *An Act to Amend the National Defence Act and to make Consequential Amendments to other Acts*,[6] which effected substantial change to the military justice system. In order to assess the efficacy of these changes, the NDA amendments included the requirement to conduct an independent review of the provisions and operations of Bill C-25 within five years of the Bill receiving Royal Assent. As a result, in March 2003, the Minister appointed the Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada, to conduct the independent review. The report containing his recommendations (the "Lamer Report") was submitted to the Minister on 3 September 2003, and was tabled in Parliament on 5 November 2003.[7]

Bill C-7, which contains the Government of Canada's legislative response to the recommendations made in the Lamer Report, was introduced and received First Reading in Parliament on 27 April 2006. Highlights of the military justice amendments proposed in the Bill include:

[5] 1st Sess., 39th Parl., 2006 [Bill C-7].

[6] 1st Sess., 36th Parl., 1998.

[7] The Lamer Report may be accessed online at: www.forces.gc.ca/site/reports/review/en/report_e.pdf.

- Strengthening the provisions of the NDA relating to the independence of military judges, specifically by providing for security of tenure of military judges until retirement, as well as enhancing the jurisdiction of military judges to deal with pre-trial issues;
- Increasing the timeliness and flexibility of the system by providing for appointment of part-time military judges to a Reserve Force Military Judges Panel;
- Modernizing and enhancing the sentencing provisions of the Code of Service Discipline by providing a more flexible range of dispositions including absolute discharges, intermittent sentences and restitution orders, and providing for the use of victim impact statements at courts martial;
- Requiring the unanimous decision of a panel at a General or Disciplinary Court Martial in order to convict or acquit an accused; and
- Articulating the fundamental purposes, principles and objectives of sentencing in the military justice system in order to crystallize those concepts, statutorily affirm the *raison d'être* of a separate military justice system, and provide clear guidance to participants in the military justice system, as to the principles to be applied in sentencing in the military justice system.

Bill C-7 is awaiting Second Reading.

Bill C-18, *An Act to Amend certain Acts in relation to DNA Identification*[8]

On 8 June 2006, Bill C-18 was introduced in the House of Commons for the purpose of making a number of technical amendments and corrections to those amendments made to Bill C-13, *An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act*,[9] which received Royal Assent on 19 May 2005 but have not yet been proclaimed into force. Bill C-18 was passed in the House of Commons on 28 March 2007, and was introduced and received First Reading in the Senate on 29 March 2007.

[8] 1st Sess., 39th Parl., 2006 [Bill C-7].
[9] 1st Sess., 36th Parl., 1998.

6.3 Regulatory Amendments

Amendments to the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) in relation to Bill C-10, *An Act to Amend the Criminal Code (Mental Disorder) and to Make Consequential Amendments to Other Acts Including the National Defence Act*[10]

Bill C-10 received Royal Assent on 19 May 2005 with the majority of provisions coming into force on that day and the remaining provisions coming into force on 2 January 2006. The principal purpose of Bill C-10 was to amend the provisions in the CC and other Acts, including the NDA, that relate to accused persons found unfit to stand trial or not criminally responsible on account of mental disorder. The preparation of amendments to the QR&O that are necessary to reflect the changes made to the NDA continued during the reporting period and are expected to be completed during the next reporting period.

Regulations in relation to Bill S-3, *An Act to Amend the National Defence Act, the Criminal Code, the Sex Offender Information Registration Act (SOIRA) and the Criminal Records Act*[11]

The amendments to the NDA contained in Bill S-3 authorize the Governor in Council to make regulations with regard to the means by which designated classes of persons who are required to report or notify under SOIRA: designating classes of military operations;[12] authorizing persons or classes of persons to collect or register information under SOIRA, and designating places or classes of places as registration centres.[13] Initial preparations of these regulations were undertaken during the reporting period.

[10] R.S.C. 2005, c. C-22 [Bill C-10].

[11] *Supra* note 1.

[12] For the purposes of this regulation, the Chief of the Defence Staff may make a determination under s. 227.16 of the SOIRA as it relates to national or operational security, or international relations, the effect of which is to exempt a participant from providing information relating to the operation under his or her notification requirements at s. 6 of that Act.

[13] *Supra* note 2 at section 227.2.

Military Rules of Evidence (MRE)

The project to update the MRE (which govern the admissibility of evidence at courts martial) continued during this reporting period. A comprehensive working draft was referred to the Department of Justice Regulation Drafting Section during the last reporting period. A response to the draft was received during this reporting period and work on the draft revised Rules is ongoing.

6.4 Policy Initiatives

Director of Military Prosecution Policy 016/06 – *Determining the Type of Court Martial to Try an Accused Person*[14]

During the reporting year, the Director of Military Prosecution issued a policy directive regarding the determination of the type of court martial to try an accused person. The publication of this policy, designed to make the prosecutorial decision making process more comprehensible, open and accountable, is consistent with the ongoing efforts to maintain and enhance public confidence in the administration of military justice.

Committees on Military Justice

Since 1999, four separate committees on military justice have been in existence to assist in the superintendence and review of the administration of military justice: the Military Justice Stakeholders' Committee, the CF Code of Service Discipline Committee, the JAG Advisory Panel on Military Justice, and the Military Justice Round Table. These committees provide forums for the discussion of military justice issues from both the strategic and practical perspectives.

During the 2006-2007 reporting period, a review of the current committee structure was undertaken to ensure that it is continuing to meet the needs of the CF and the military justice system. Following an organizational meeting held on 2 February 2007, it was agreed that a committee with a specific

[14] See: http://www.forces.gc.ca/jag/military_justice/cmps/policy_and_directives/DIRECTIVE%20016.doc

focus on the administration of military justice would be created. This committee will be co-chaired by the Chief Military Judge and the JAG, and its membership will include a representative from the Canadian Military Prosecution Service, Defence Counsel Services and the Directorate of Law/ Military Justice Policy and Research. Meetings of the new committee are expected to begin early in the next reporting period.

In the 2005-2006 JAG Annual Report, information was provided on certain decisions made by the military justice committees during that reporting period. In particular, it was reported that the Military Justice Stakeholders' Committee had agreed to further discuss the possibility of creating a committee to review the Court Martial Appeal Court (CMAC) Rules of Appeal Practices and Procedures.[15] While this committee did not meet during the 2006-2007 reporting period, it is expected that consideration of this issue will be undertaken again in the next reporting period.

It was also indicated in last year's Annual Report that the CF Code of Service Discipline Committee had endorsed an approach for addressing existing concerns on level of training being provided to assisting officer that involved enhancing existing in-service training to include content relevant to the role of an assisting officer. While work has been ongoing to address concerns with assisting officer training, it is anticipated that the development of a comprehensive approach for training, such as what was identified by the Code of Service Discipline Committee, will be possible during the next reporting period with the expected establishment of the CF Military Law Centre (CFMLC).[16]

[15] See 2005-2006 JAG Annual Report at: http://www.forces.gc.ca/jag/office/publications/annual_reports/2006annualreport_e.pdf.

[16] This proposal is further discuss in chapter 3, section 3.3 – Survey Results and Analysis. As well, information on the CFMLC is found in chapter 7, section 7.2 – Office of the Judge Advocate General.

Chapter–7

The Way Ahead: Strategic Initiatives

7.1 Introduction

As the superintendent of the administration of military justice in the CF, the JAG is responsible for assessing the health of the military justice system on an on-going basis and for developing initiatives as required to strengthen and enhance the administration of military justice. To that end, the JAG will be advancing initiatives and undergoing organizational changes in three areas during the upcoming reporting period. First, further opportunities for legal officers to develop their skills and experience in operational and international settings are being pursued with the addition of new deployment and exchange opportunities along with the creation of the Canadian Forces Military Law Centre. Second, data collection and reporting capabilities within the Office of the JAG will be improved, which will enhance the current ability to assess the functioning of the military justice system. Third, the current materials used for military justice training will be reviewed and new materials introduced.

7.2 Office of the Judge Advocate General

Legal Officer Deployments and Exchanges

In addition to the positions for deployed legal officers discussed in Chapter 1, the Office of the JAG is expecting the introduction of several additional deployment opportunities for legal officers during the next reporting period. These opportunities include positions within the United Nations and coalition force headquarters in countries such as the Sudan, the Democratic Republic of Congo and Afghanistan. One example is a new position being established with a US military legal advisory team in Afghanistan, whose function is to mentor the Afghan military legal service and military judges in the implementation of a military justice system for the Afghan National Army.

In addition, plans are being finalized for the creation of an exchange posting to the US Army JAG Center for Law and Operations in Charlottesville, Virginia. It is expected that the first legal officer to fill this position will be posted during the next reporting period.

The Canadian Forces Military Law Centre (CFMLC)

The creation of the CFMLC, to be located in Kingston, Ontario, is expected to receive final approval and be established early in the next reporting period under the command of the Canadian Defence Academy (CDA). The mission of the CFMLC will be to lead the design, development and delivery of operationally focused military legal education, training, research and doctrine for all members of the CF in support of the CDA. Consequently, the focus of the CFMLC will be to provide and extend legal education and training to the CF at all levels, with a view to enhancing the operational effectiveness of the CF as a whole. The effect of this development is that most of the functions originally devoted to the DLaw/Training (DLaw/T) will be taken over by the CFMLC. As an example, following the inauguration of the CFMLC, the Presiding Officer Certification Training, the Presiding Officer Re-Certification Test and the Legal Officer Intermediate Training – Military Justice will be administered through the CFMLC.

The CFMLC will be staffed primarily by legal officers in positions outside the JAG establishment within the CDA Headquarters. The CFMLC will be established initially with nine legal officers, including a Director and a Deputy Director.

7.3 The Military Justice System

Data Collection Methods

While the Court Martial Reporting System (CMRS) and Summary Trial Database (Database) have been useful tools for monitoring the status of the military justice system, a more flexible tool is required to ensure all the salient information relating to the military justice system is captured and analysed. To that end, the Comprehensive Information Management Project (CIMP), which is expected to be operational in the 2009 – 2010 timeframe, is being designed in part to address this lack of flexibility. With reference to the JAG's superintendence function, the CIMP will eliminate the need for separate database systems to monitor the function of the military justice system. With one centralized system into which information is entered by the relevant directorate, a single-source set of statistics will be readily available at all times.

Until CIMP comes online, the Office of the JAG continues to rely on both the CMRS and the Summary Trial Database to collect the information required with respect to courts martial and summary trials to enable the necessary assessments be conducted of the military justice system.

Revision of the Presiding Officer Certification Training (POCT)

Since 8 July 1999, the JAG has been responsible for providing training and certifying all commanding officers, superior commanders and delegated officers as qualified to perform their duties in the administration of the Code of Service Discipline.[1] The JAG uses POCT as the principal tool in carrying out this responsibility. While the POCT manual, *Military Justice at the Summary*

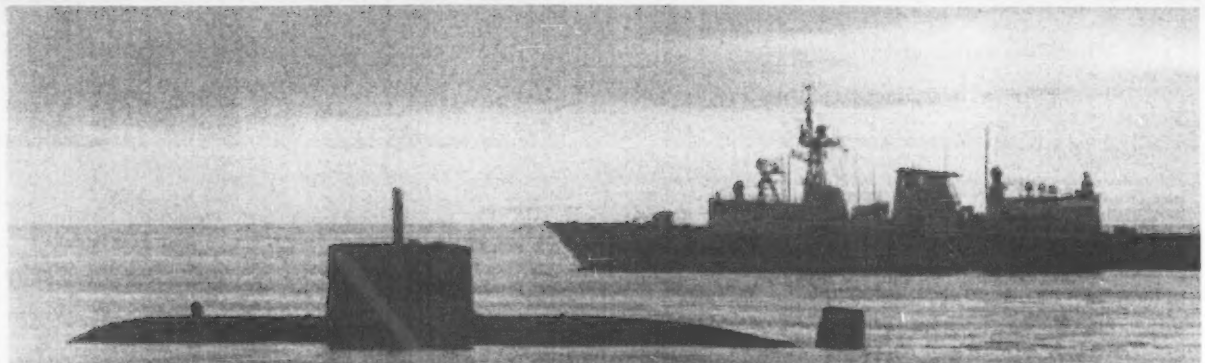
[1] QR&O, articles 101.09 *Training and Certification of Superior Commanders and Commanding Officers*, 108.10 *Delegation of Commanding Officer's Powers.*

Trial Level,[2] has been updated since its introduction, the course itself has not been substantially revised. The DLaw/T began a complete review of the course during the reporting period, and it is expected that the review and the necessary revision of the POCT will be completed during the 2007-2008 reporting period. The results of that review will be provided to the CFMLC.

Manual on Disciplinary Investigations and Charge Laying

To address the current lack of training and resource materials for those CF members responsible for conducting unit investigations and laying charges at the unit level, a draft manual on this subject matter was developed during the current reporting period. Review of the draft manual with the assistance of AJAG CWOs/CPO1s is ongoing, and it is expected that the document will be completed during the next reporting period.

[2] This manual can be viewed at:
http://www.forces.gc.ca/jag/training/publications/POCTManual_e.asp.



Chapter–8

Conclusion

It has been recognized that the safety and well being of Canadians depend considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the CF in a state of readiness, the military chain of command must be in a position to enforce internal discipline effectively and efficiently.[1] Through the military justice system, the chain of command is provided a mechanism for maintaining discipline while balancing the need for a disciplined force and the rights of its members to be treated fairly and appropriately. Accordingly, to fulfill this role it is essential that the Canadian military justice system remain strong and effective.

The statistical data analyzed for the reporting period demonstrates that the number of summary trials remained steady while the number of courts martial increased substantially as compared to the last reporting period. With regard to summary trials, the data is indicative that the chain of command continues to utilitize this type of service tribunal to address breaches of discipline in a rapid, effective and fair manner. While the statistics also reveal an increase in the number of summary trials involving negligent discharges, there is not yet enough information to make any conclusions as to the cause. This is a matter that will be closely monitored during the next reporting period.

[1] *R.* v. *Généreux*, [1992] 1 S.C.R. 259.

The increase in courts martial is an encouraging sign that the greater availability of military judges during the reporting year has positively impacted the efficacy of the court martial system. During the next reporting period, the issue of timeliness within the military justice system will continue to be examined to ensure that charges under the Code of Service Discipline are dealt with as expeditiously as the circumstances permit.

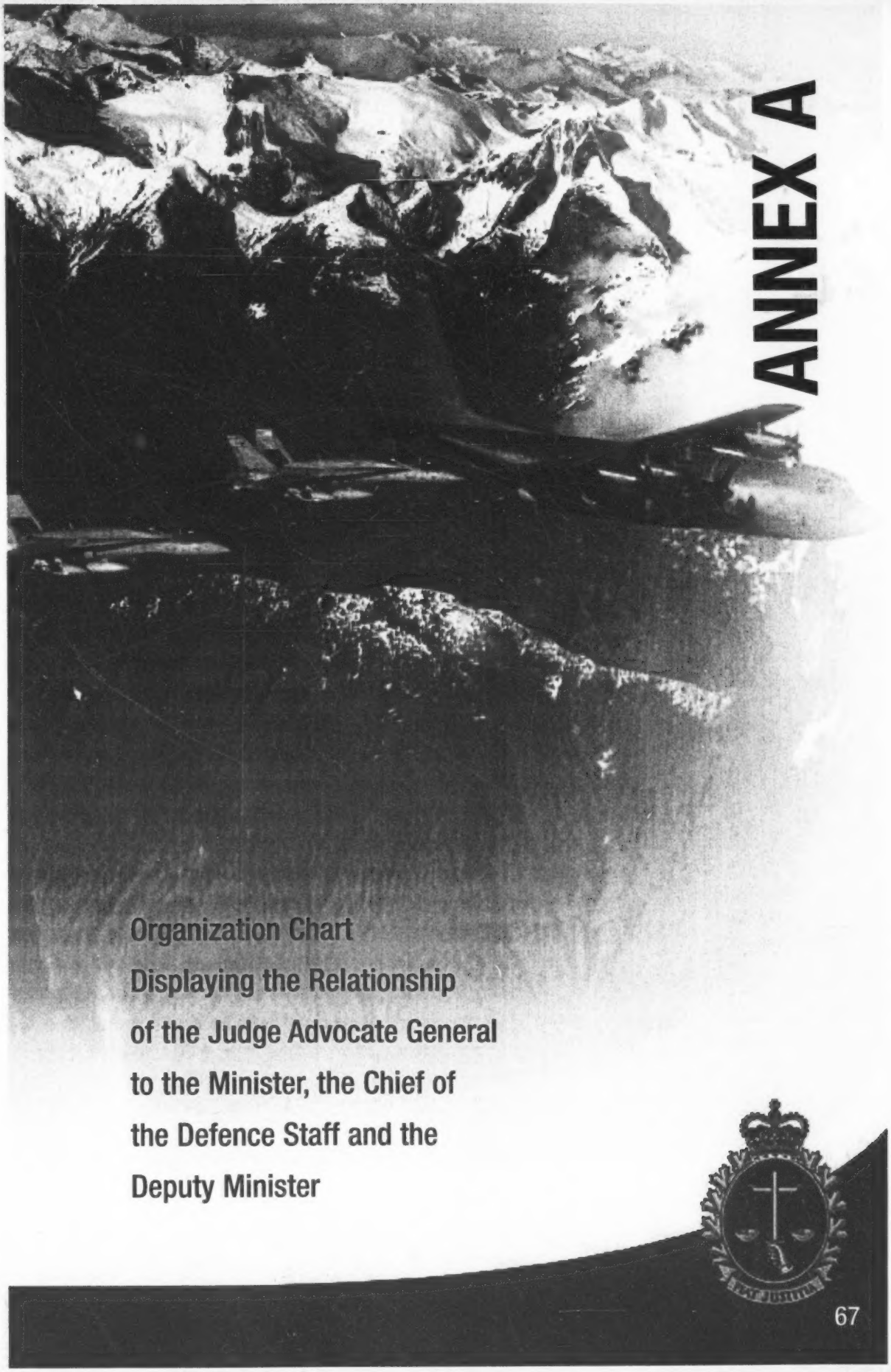
Complementary studies to the statistical analysis reinforce that, overall, the military chain of command is satisfied with the military justice system, and that the system is continuing to meet its needs. In particular, the results from the Survey on the Summary Trial Process indicate that the CF is highly compliant with the regulatory requirements relating to military justice, and that chain of command is confident that summary trials allow breaches of military discipline to be dealt with fairly and efficiently at the unit level. Furthermore, the majority of the survey participants who had been tried at summary trial expressed confidence in the overall fairness of the process. Similarly, the majority of participants in the Interview Survey of Stakeholders indicate an overall satisfaction with the military justice system and in particular the summary trial process.

A concern raised by respondents of both surveys relates to the level of training being provided to assisting officers in light of their unique role. As mentioned in this report, in addition to the efforts that have been made within the Office of the JAG to improve assisting officer training, a comprehensive approach to assisting officer training is required. This issue will be referred to the Canadian Forces Military Law Centre. A further concern raised by participants of the Interview Survey relates to the time required for disciplinary matters to be dealt with by court martial. The Office of the JAG is actively examining a number of ways to increase efficiency and expediency within the military justice system while maintaining the level of fairness provided in our existing processes.

This reporting period has been significant in terms of legislative initiatives to enhance the military justice system. In particular, Bill S-3 amends the NDA to mirror the provisions in the *Criminal Code* to allow courts martial to order an offender convicted of a designated offence to register in accordance with *Sexual Offender Information Registration Act* while taking into account the unique operational environment of the CF. The Office of the JAG has also worked effectively with other government departments to ensure the military justice system accords with new legislative initiatives. For example, Bill C-18 amends the NDA to ensure the provisions relevant to DNA orders in the military justice system reflect the relevant changes being made to the *Criminal Code.*

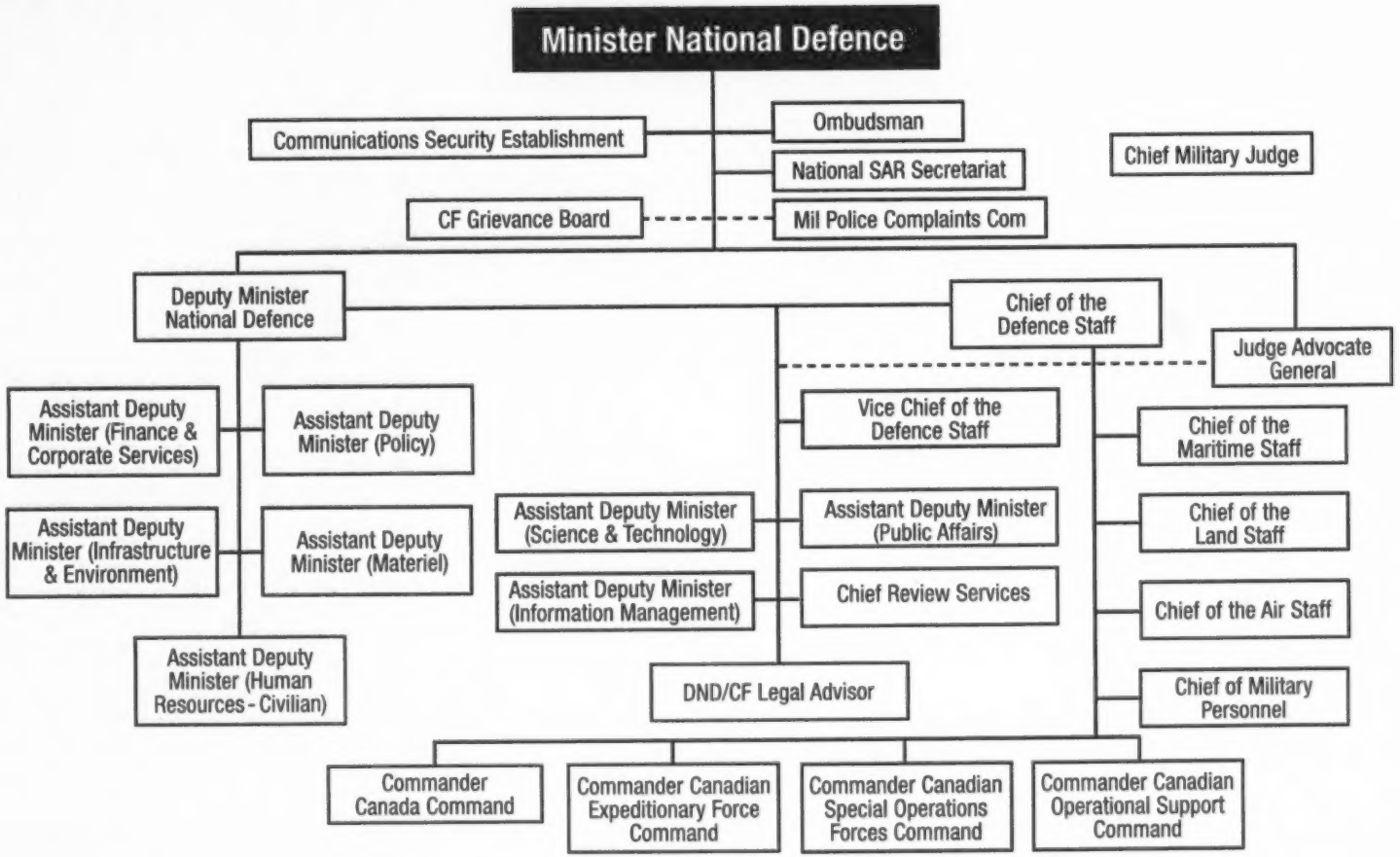
The 2006-2007 period has also been marked with significant change in the Office of the JAG. The establishment of operational commands necessitated restructuring the DJAG/Ops division to ensure that adequate resources are in place to meet the expanded need for legal support within the operational command headquarters and to the strategic level commanders. Along with operational support here in Canada, approximately one in five regular force legal officers were deployed during the reporting period in support of international operations. Deployed legal officers fulfill a key role by ensuring that the chain of command is provided timely legal support with regard to all aspects of military law including military justice.

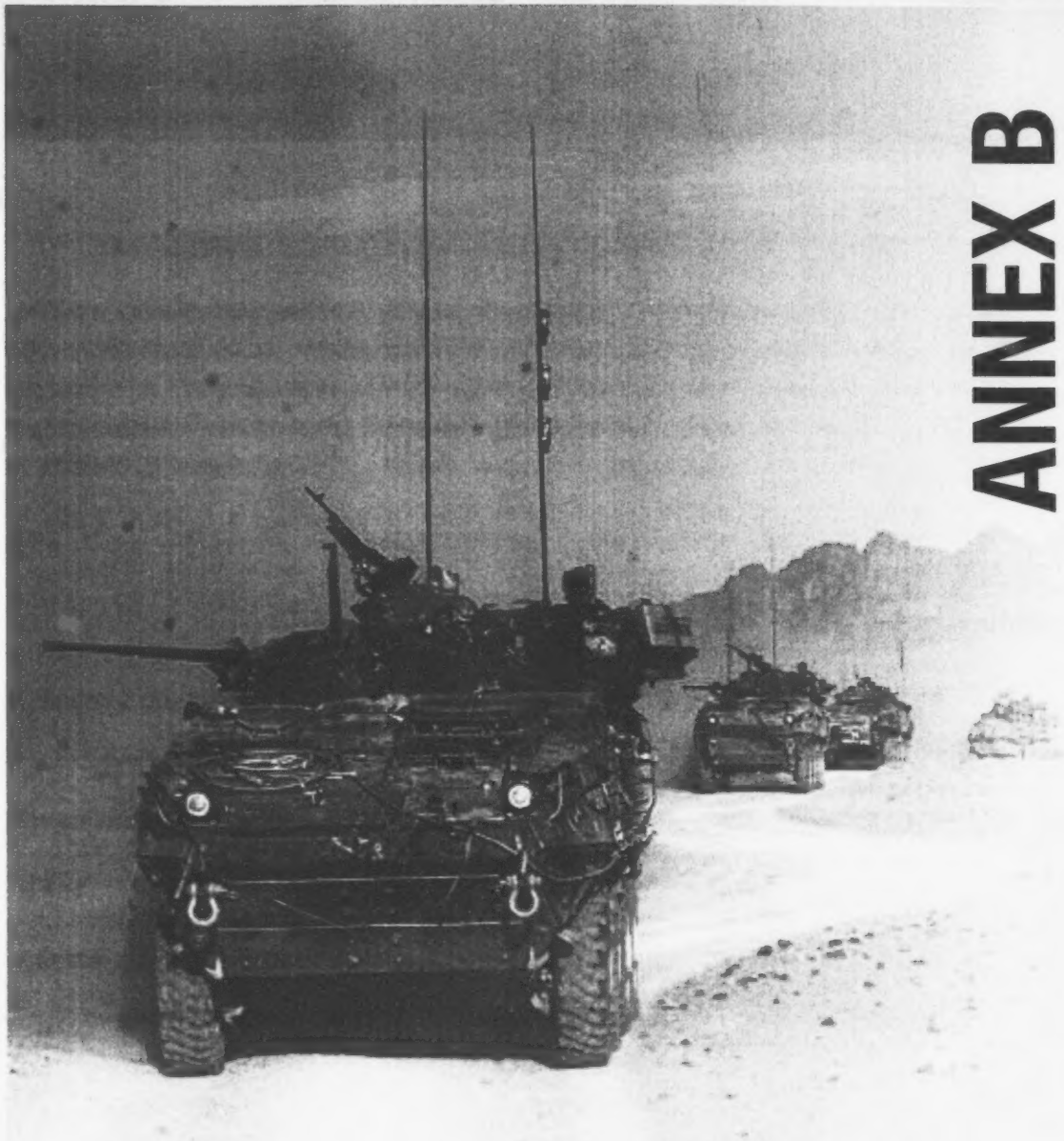
In summary, the information gathered and analyzed during the reporting period demonstrates the chain of command's confidence in the military justice system. Legislative development coupled with the commitment to support military justice training also serves to support the military chain of command in the furtherance of operations by ensuring that disciplinary matters at both the summary trial and court martial level are efficient, fair and are consistent with Canadian law and values. These initiatives, and the others highlighted in this report are reflective of the JAG's overall vision, namely, that justice be done in the defence of Canada.



ANNEX A

Organization Chart Displaying the Relationship of the Judge Advocate General to the Minister, the Chief of the Defence Staff and the Deputy Minister


Minister National Defence
Communications Security Establishment
Ombudsman
National SAR Secretariat
Chief Military Judge
CF Grievance Board
Mil Police Complaints Com
Deputy Minister National Defence
Chief of the Defence Staff
Judge Advocate General
Assistant Deputy Minister (Finance & Corporate Services)
Assistant Deputy Minister (Policy)
Vice Chief of the Defence Staff
Chief of the Maritime Staff
Assistant Deputy Minister (Science & Technology)
Assistant Deputy Minister (Public Affairs)
Chief of the Land Staff
Assistant Deputy Minister (Infrastructure & Environment)
Assistant Deputy Minister (Materiel)
Assistant Deputy Minister (Information Management)
Chief Review Services
Chief of the Air Staff
Assistant Deputy Minister (Human Resources - Civilian)
DND/CF Legal Advisor
Chief of Military Personnel
Commander Canada Command
Commander Canadian Expeditionary Force Command
Commander Canadian Special Operations Forces Command
Commander Canadian Operational Support Command

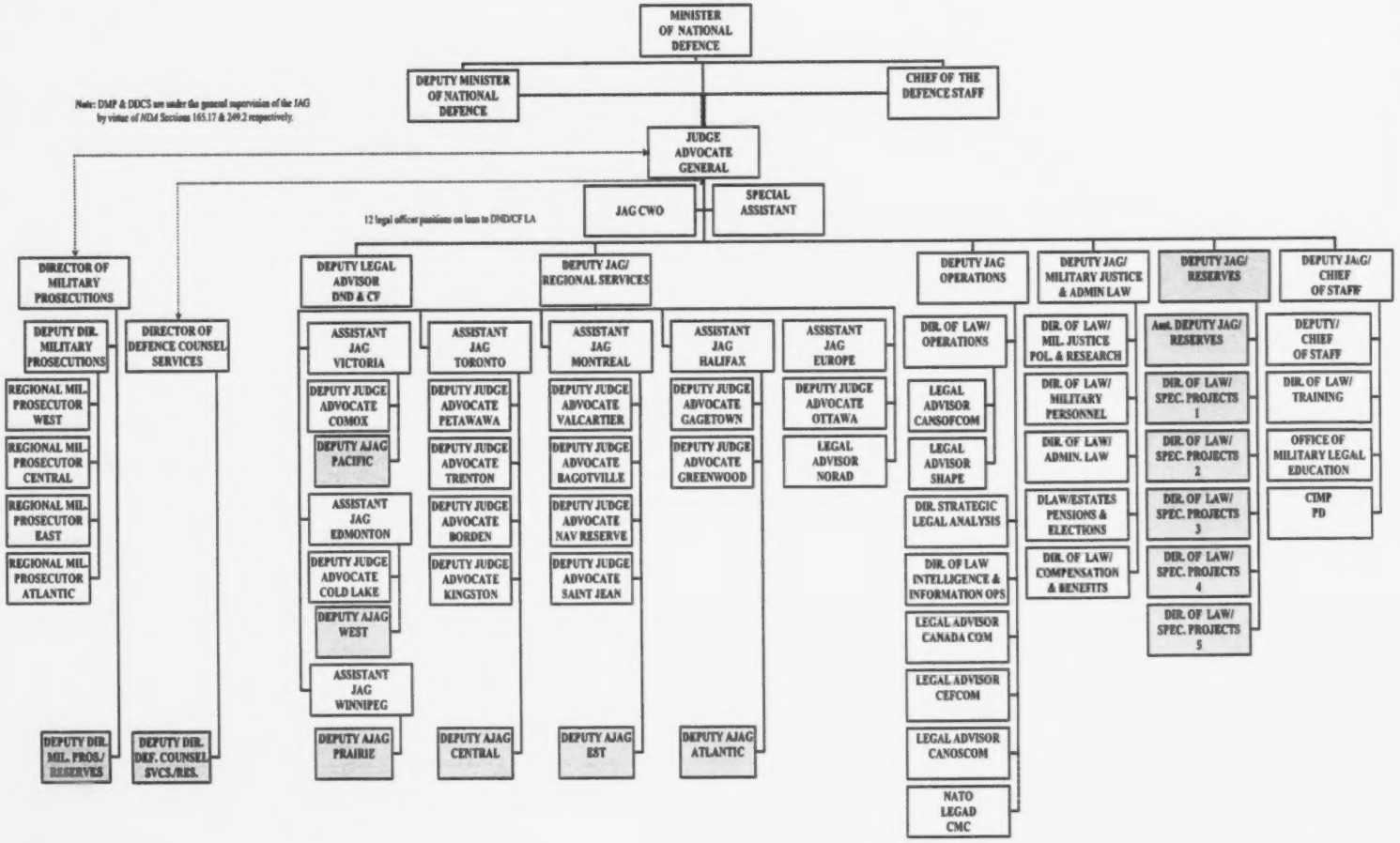


ANNEX B

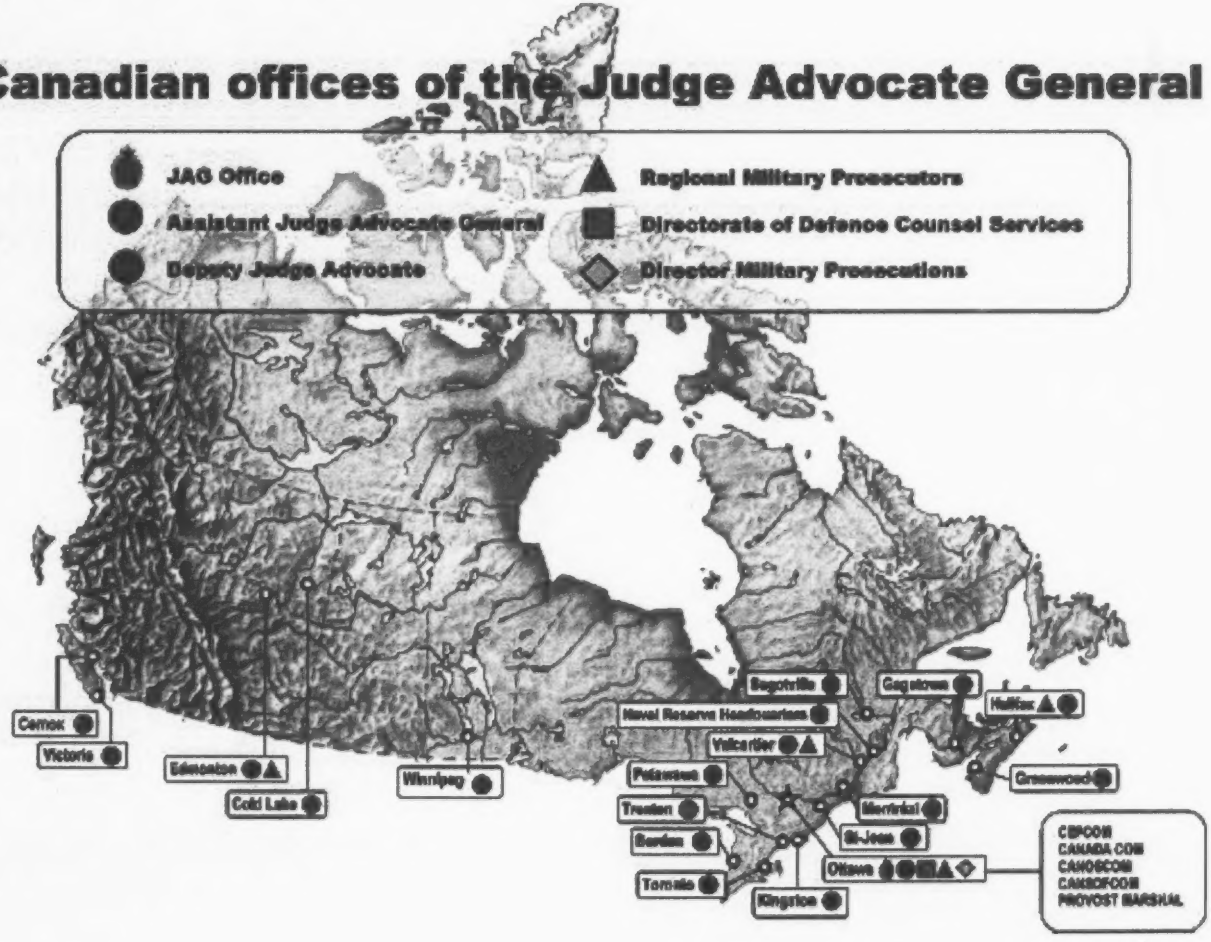
Organization Chart of the Office of the Judge Advocate General

Maps of Judge Advocate General Offices

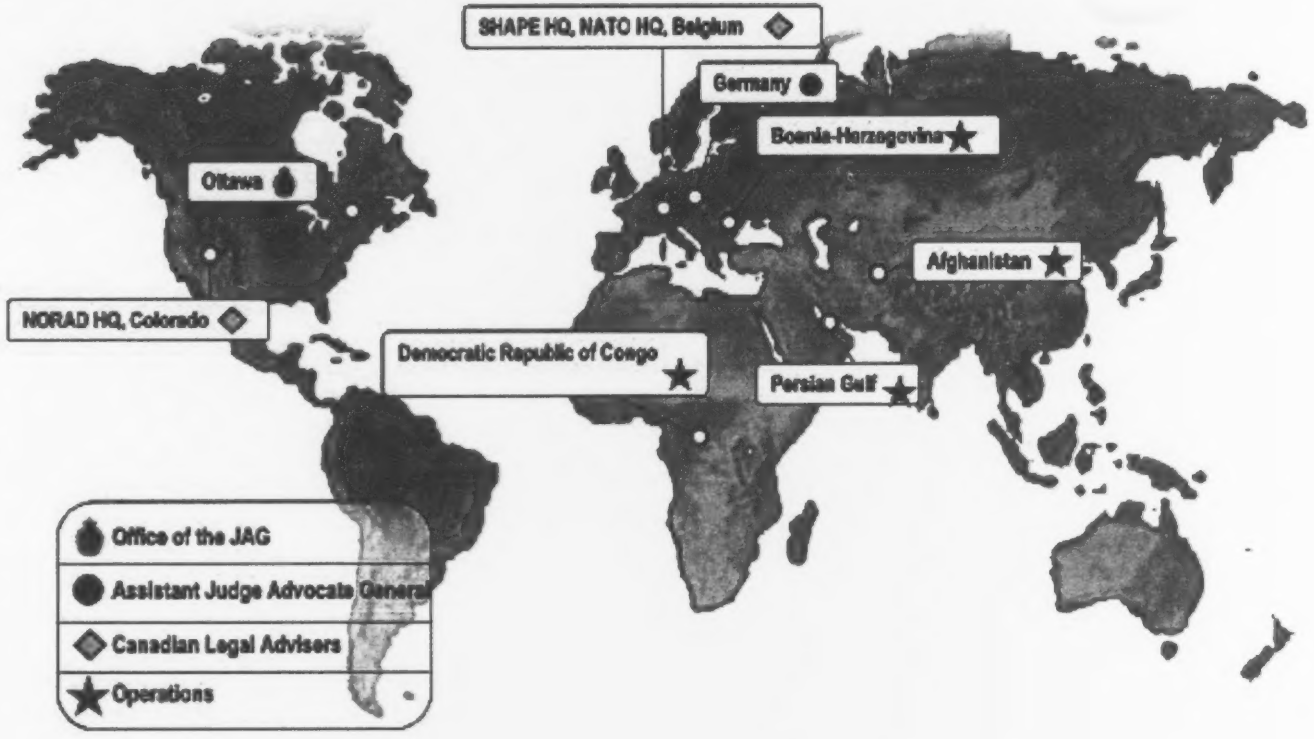
ORGANIZATION CHART
OFFICE OF THE JUDGE ADVOCATE GENERAL


MINISTER OF NATIONAL DEFENCE
DEPUTY MINISTER OF NATIONAL DEFENCE
CHIEF OF THE DEFENCE STAFF
Note: DMP & DDCS are under the general supervision of the JAG by virtue of NDA Sections 165.17 & 249.2 respectively.
JUDGE ADVOCATE GENERAL
JAG CWO
SPECIAL ASSISTANT
12 legal officer positions on loan to DND/CF LA
DIRECTOR OF MILITARY PROSECUTIONS
DEPUTY DIR. MILITARY PROSECUTIONS
REGIONAL MIL. PROSECUTOR WEST
REGIONAL MIL. PROSECUTOR CENTRAL
REGIONAL MIL. PROSECUTOR EAST
REGIONAL MIL. PROSECUTOR ATLANTIC
DEPUTY DIR. MIL. PROS/ RESERVES
DIRECTOR OF DEFENCE COUNSEL SERVICES
DEPUTY DIR. DEF. COUNSEL SVCS./RES.
DEPUTY LEGAL ADVISOR DND & CF
DEPUTY JAG/ REGIONAL SERVICES
ASSISTANT JAG VICTORIA
DEPUTY JUDGE ADVOCATE COMOX
DEPUTY AJAG PACIFIC
ASSISTANT JAG EDMONTON
DEPUTY JUDGE ADVOCATE COLD LAKE
DEPUTY AJAG WEST
ASSISTANT JAG WINNIPEG
DEPUTY AJAG PRAIRIE
ASSISTANT JAG TORONTO
DEPUTY JUDGE ADVOCATE PETAWAWA
DEPUTY JUDGE ADVOCATE TRENTON
DEPUTY JUDGE ADVOCATE BORDEN
DEPUTY JUDGE ADVOCATE KINGSTON
DEPUTY AJAG CENTRAL
ASSISTANT JAG MONTREAL
DEPUTY JUDGE ADVOCATE VALCARTIER
DEPUTY JUDGE ADVOCATE BAGOTVILLE
DEPUTY JUDGE ADVOCATE NAV RESERVE
DEPUTY JUDGE ADVOCATE SAINT JEAN
DEPUTY AJAG EST
ASSISTANT JAG HALIFAX
DEPUTY JUDGE ADVOCATE GAGETOWN
DEPUTY JUDGE ADVOCATE GREENWOOD
DEPUTY AJAG ATLANTIC
ASSISTANT JAG EUROPE
DEPUTY JUDGE ADVOCATE OTTAWA
LEGAL ADVISOR NORAD
DEPUTY JAG OPERATIONS
DIR. OF LAW/ OPERATIONS
LEGAL ADVISOR CANSOFCOM
LEGAL ADVISOR SHAPE
DIR. STRATEGIC LEGAL ANALYSIS
DIR. OF LAW INTELLIGENCE & INFORMATION OPS
LEGAL ADVISOR CANADA COM
LEGAL ADVISOR CEFCOM
LEGAL ADVISOR CANOSCOM
NATO LEGAD CMC
DEPUTY JAG/ MILITARY JUSTICE & ADMIN LAW
DIR. OF LAW/ MIL. JUSTICE POL. & RESEARCH
DIR. OF LAW/ MILITARY PERSONNEL
DIR. OF LAW/ ADMIN. LAW
DLAW/ESTATES PENSIONS & ELECTIONS
DIR. OF LAW/ COMPENSATION & BENEFITS
DEPUTY JAG/ RESERVES
Asst. DEPUTY JAG/ RESERVES
DIR. OF LAW/ SPEC. PROJECTS 1
DIR. OF LAW/ SPEC. PROJECTS 2
DIR. OF LAW/ SPEC. PROJECTS 3
DIR. OF LAW/ SPEC. PROJECTS 4
DIR. OF LAW/ SPEC. PROJECTS 5
DEPUTY JAG/ CHIEF OF STAFF
DEPUTY/ CHIEF OF STAFF
DIR. OF LAW/ TRAINING
OFFICE OF MILITARY LEGAL EDUCATION
CIMP PD

Canadian offices of the Judge Advocate General



Offices of the Judge Advocate General outside Canada



ANNEX C

Annual Report of the Director of Military Prosecutions

1. Introduction

This document is prepared in accordance with the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), wherein the Director of Military Prosecutions (DMP) is required to report annually to the Judge Advocate General (JAG) on the execution of her duties and functions.[1] This eighth annual report covers the period from 1 April 2006 to 31 March 2007.[2]

This report includes the following subjects:

- The DMP's Role, Organization, and Personnel
- Training and Policy Development
- Military Justice Proceedings: trials, appeals and other hearings

2. DMP's Role, Organization, and Personnel

The Minister of National Defence appoints the DMP.[3] While she acts under the general supervision of the JAG, she exercises her duties and functions independently.[4] Some of these duties and functions are noted below:

- Reviewing all charges referred to her through the chain of command and determining whether:
  - These charges should be tried by either a summary trial or one of the different types of courts martial or not tried at all; and
  - If charges are deemed appropriate to be tried by court martial then prefer any other charge that is founded on facts disclosed by evidence in addition to or in substitution for the charges referred.

[1] See *QR&O* 110.11.

[2] Previous DMP Annual Reports, along with copies of DMP Policy Directives and other related information can be found at the DMP website: http://www.forces.gc.ca/jag/military_justice/cmps/default_e.asp.

[3] *National Defence Act*, s. 165.1.

[4] The duties and functions of the DMP are set out in the *National Defence Act*, the *QR&O*, ministerial orders and other agreements.

- Conducting – in Canada or overseas – the prosecution of all charges tried by courts martial.
- Acting as appellate counsel for the Minister of National Defence on all appeals from courts martial.
- Acting as the representative of the Canadian Forces at all custody review hearings and before other boards and tribunals whose jurisdiction touches upon matters relevant to the military justice system.
- Providing legal advice to military police personnel assigned to the Canadian Forces National Investigation Service (CFNIS).

In the execution of her duties and functions, the DMP relies on a team of regular and reserve force military prosecutors, along with civilian paralegals and support staff. This team is organized regionally and consists of:[5]

- A headquarters at National Defence Headquarters in Ottawa staffed by the DMP, Deputy Director (DDMP), an appellate counsel (DMP 4) and two staff prosecutors (DMP 3 and DMP 3-2)[6] responsible for communications, training and policy development.
- Regional Military Prosecutors' (RMP) offices, each established for two regular force prosecutors, located at:
  - Halifax, Nova Scotia (Atlantic Region)
  - Valcartier, Quebec (Eastern Region)
  - Ottawa, Ontario (Central Region)
  - Edmonton, Alberta (Western Region)
- Nine reserve force prosecution positions located across Canada.[7]

[5] In December 2006, a legal officer was posted to DMP in a Military Manning Overhead position. This position is in addition to the organization described below.

[6] Currently, the legal officer posted to the DMP 3-2 position is performing Regional Military Prosecutors' (RMP) duties for Central Region.

[7] Until recently, only six of these nine positions were filled. Currently, one of these positions remains vacant and two new legal officers have been recently recruited to fill the remaining two positions. An organization chart can be found at http://www.forces.gc.ca/jag/military_justice/cmps/org_chart/CMPSOrgChart_e.pdf.

Communications are of vital importance to an organization like DMP, particularly given the geographic dispersal of CF military prosecutors. To ensure that all prosecutors remain aware of the progress of individual disciplinary files, DMP updates and distributes several internal reports on a weekly basis. The DMP also convenes regular monthly conference calls among the prosecutors to provide direction and discuss matters of common interest. On the completion of each court martial, the trial prosecutor provides all other prosecutors with a summary sheet detailing the results of the case and the reasons provided by the military judge. Continuous individual contact is maintained by the DMP and DDMP with all of the military prosecutors and key civilian staff.

During the term of this report, the office of the DMP experienced several personnel changes with a new DDMP being appointed and new prosecutors being posted to RMP (Central) and (Eastern) and (Western) offices. This year also saw one of the prosecutors for RMP (Western) on maternity leave. As well, DMP continued to have difficulty filling the DMP 3 position.

A well trained, industrious and highly motivated civilian support staff is an integral part of the DMP team and provides vital assistance in the carrying out of the prosecutorial function. A number of civilian staff changes occurred this past year including the departure of the long-time DMP's administrative assistant, the maternity leave of the prosecution's paralegal who has returned in late March 2007, as well as extended periods of absence by support staff in three of the four regional offices. Despite these staffing challenges, the diligence and hard work of the civilian staff and legal officers has allowed DMP to fulfill its mandate.

3. Training and Policy Development

The relative brevity of a legal officer's tour with DMP, usually three to five years, demands a continual and significant commitment to providing him or her with the formal and informal training and practical experience

necessary to develop the skills, knowledge and judgement essential to an effective prosecutor. Included in this development is the mentoring of less experienced prosecutors by more experienced counsel as well as courses and programmes tailored to the unique environment of a military prosecution service.

This past year, the Directorate of Law, Training (DLAW/T) conducted an Advocacy Course, attended by regular force prosecutors, as well as the members of the Directorate of Defence Council Services (DDCS). The presentations and subjects were aimed at further developing skills in trial advocacy at courts martial.

In an effort to encourage professional interaction among all military prosecutors from across the country, DMP held its annual workshop from 23 to 24 October 2006 in Ottawa. The prosecutors attended round table discussions and presentations focused on current relevant issues to military prosecutors. DMP was privileged to welcome Commander Chris Griggs of the Royal New Zealand Navy and Deputy Director of Legal Services for the New Zealand Defence Force. The Commander gave a most informative presentation from the New Zealand perspective on the issues facing military prosecutions.

The small size of the DMP organization requires that much of the prosecutorial training be provided by organizations external to DMP and the Canadian Forces. During the present reporting period, DMP prosecutors participated in conferences and continuing legal education programs organized by: the Federation of Law Societies of Canada, the Canadian Bar Association and its provincial affiliates, Osgoode Professional Development, the Ontario Crown Attorneys Association, and various provincial law societies. At the international level, two prosecutors represented DMP at the International Association of Prosecutors annual conference in Paris, France. All of the foregoing programs benefited the Canadian Forces through the knowledge acquired and skill sets expanded by the attendees. The value of the professional bonds forged by the military prosecutors and their colleagues from provincial, federal and international prosecution services cannot be understated.

Individual military prosecutors also took part in a variety of legal officer professional development activities ranging from the Legal Officer Intermediate Training program (LOIT) to the Officer Professional Military Education program (OPME) to continuing language training. All regular force prosecutors have current Presiding Officer qualifications; twelve regular force military prosecutors have completed recertification training, while two have completed the initial training course (POCT). Five reserve prosecutors are currently certified while two new reserve prosecutors will complete the training shortly. The remaining reserve prosecutor will complete recertification training as soon as possible. Military prosecutors are legal officers in the Canadian Forces and, as such, they must retain their military skills and qualifications so that the office of the DMP can meet deployment requirements. In order to maintain their operational readiness to deploy, military prosecutors took part in several individual military skills sessions including weapons familiarization and first aid training.

4. Military Justice Proceedings

The tasks a CF member may be called upon to perform as a soldier, sailor or airman and the circumstances under which such tasks may be undertaken, call for a high degree of discipline. Parliament and the courts have long recognized that the creation and maintenance of such discipline requires a special code of law to define the member's duty and obligation, and to prescribe punishment.

This special code of law, the *Code of Service Discipline*[8] is designed to assist commanders in the promotion and maintenance of good order, high morale, efficiency, discipline, and operational effectiveness. To these ends, the *Code of Service Discipline* creates a structure of military tribunals as the ultimate means of enforcing discipline; among these tribunals are courts martial and the Court Martial Appeal Court of Canada (CMAC).

[8] Part III of the *National Defence Act (NDA)*.

During the present reporting period, military prosecutors represented the interest of the Canadian Forces in a number of different types of judicial proceedings including courts martial, appeals from courts martial, reviews of pre-trial custody and mental health review boards.

i. Courts Martial

For the period of 2006/2007, the DMP received 123 applications for disposal of a charge from various referral authorities. This figure constitutes approximately a 20% increase in comparison to the average number of annual applications calculated since the 2002-2003 fiscal year.

Following review by individual military prosecutors, 195 charges were preferred to court martial in respect of 89 applications. A decision to not prefer any charges, either because there was no reasonable prospect of conviction, or because the public interest did not require the prosecution of charges, was made in respect of 43 applications. No determination as to disposal has been made in respect of the remaining 15 applications[9] by the end of this fiscal year.

For this fiscal year, 14 cases were withdrawn by the DMP, because the reasonable prospect of conviction no longer existed or the public interest no longer required a prosecution to be pursued.[10] As of 31 March 2007, 1 court martial had been commenced but not yet completed, 21 had been convened but not yet commenced and a further 38 charge sheets had been preferred to the Court Martial Administrator (CMA) and were awaiting the assignment of a military judge and the convening of a court martial. The number of courts martial completed has increased to levels slightly higher than 2004-2005, indicating that the significantly lower number of courts martial completed in the last fiscal year was indeed an anomaly.

[9] These statistics include not only applications for disposal referred in 2006-2007, but also applications referred in the previous fiscal year for which no preferral or non-preferral decision was made prior to the 2006-2007 fiscal year.

[10] This figure includes 3 cases in which all charges were withdrawn at court martial and the remaining 11 cases in which all charges were withdrawn prior to court martial.

Court Martial backlog, that is the number of preferred matters awaiting disposal by courts martial, was reported as being of concern during the last annual report. The causes for this backlog appear to be two-fold: first, the series of applications relating to the independence of military judges which occupied significant court time and caused the rescheduling of a number of trials; second, the shortage of military judges, arising from a lack of Judicial availability beginning in October 2005, continuing with the illness of the Chief Military Judge (CMJ) in late 2005, and persisting until the assumption of presiding duties in September 2006 by two newly appointed military judges.

The underlying causes of this systemic concern relating to backlog have been addressed, particularly with the assumption of duties by the two new military judges. DMP is confident, based on the dispatch with which matters that are preferred are now being brought before courts martial, that the backlog will return to historically acceptable levels over the coming year.

All courts martial held during the reporting period were either Standing Courts Martial (SCM), composed of a military judge sitting alone or Disciplinary Courts Martial (DCM) with a panel of three members and a military judge presiding. Two courts martial, originally convened as DCMs, were later re-convened as SCMs as a result of representations made to DMP and, pursuant to DMP Policy Directive 16/06, "Determining the Type of Court Martial to Try an Accused Person."

At the conclusion of 61 Standing Courts Martial and 6 Disciplinary Courts Martial, a total of 67 trials, 57 findings of guilty were made in respect of at least one charge.

While the NDA only permits the passing of one sentence on an offender at a court martial, that sentence may involve more than 1 punishment. The 57 sentences pronounced by courts martial during the reporting period involved 93 punishments. A fine was still the most common punishment, with 47 fines being imposed. Of note, 8 punishments of imprisonment and 3 punishments of detention were imposed by the courts. A suspended

sentence, where the accused is not actually required to be incarcerated, was imposed in 5 of the 11 cases involving a sentence of imprisonment or detention. Military judges heard 1 application for release pending appeal in the cases where a custodial sentence was imposed.

A matter previously noted in last year's DMP Annual Report, involving an accused and complainant, both members of Joint Task Force 2 (JTF2), is on going. A court martial has not yet been convened to try charges recorded on a classified charge sheet preferred by DMP. As reported last year, the CMJ refused to assign a military judge to hear the matter, and without such an assignment, the CMA refused to convene a court martial. The DMP's application to the Federal Court of Canada for a writ of *mandamus* to compel the CMJ to assign a military judge and the CMA to issue a convening order was denied by the Court on 21 December 2006. DMP filed a notice of appeal with the Federal Court of Appeal and it is expected that the matter will be heard in the summer of 2007.

ii. Appeals

During the present reporting period appellate counsel appointed by DMP represented the Canadian Forces in 12 appeals, all of which were made by members of the Canadian Forces who had been convicted and sentenced by court martial. DMP brought cross-appeals in 3 of these cases. The CMAC conducted oral hearings in respect of 3 of the 12 appeals. One appeal was abandoned by the appellant. The remaining 8 matters have not yet been disposed of. Annex C provides additional information regarding the nature and progress of each appeal.

Two of the appeal decisions rendered during the present reporting period are worthy of particular comment. Corporal Parsons and Master Corporal Dunphy both appealed their convictions by Standing Court Martial. During their trials, both appellants had made applications challenging the constitutionality of particular provisions of the *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces* that related to the independence of

military judges. In both cases, the presiding military judge (the same judge in both cases) held that legislative provisions limiting the appointment of a military judge to a term of five years with the possibility of reappointment were not, in and of themselves, unconstitutional. He did, however, hold that some of the provisions regulating the reappointment process did not provide a military judge with sufficient guarantees of secure tenure. The military judge made declarations to that effect but declined to order stays of proceedings sought by the applicants.

Both Corporal Parsons and Master Corporal Dunphy appealed, arguing (among other grounds) that the military judge had erred in dismissing portions of their constitutional challenges and in declining to grant them stays of proceedings. DMP cross-appealed, arguing that the military judge had erred in declaring the provisions related to the reappointment process to be unconstitutional. The CMAC ordered that the appeals be heard together.

Following oral argument, the CMAC allowed Corporal Parsons' appeal on grounds that were unrelated to the constitutional issues. It dismissed Master Corporal Dunphy's appeal when his counsel conceded that he was not entitled to a stay of proceedings. The CMAC also dismissed the cross-appeal, holding itself to be "in substantial agreement with the conclusion of the military judge." The court made additional non-binding comments regarding the security of tenure for military judges, noting that the role of military judges has evolved as a result of legislative changes and agreeing with a recommendation of former Chief Justice Lamer that military judges should be granted tenure to a fixed retirement age.

iii. Other Hearings

Military judges are required to review orders made to retain CF members in service custody while awaiting trial. DMP is mandated to represent the interest of the Canadian Forces at such hearings. During the present reporting period, military prosecutors appeared at 2 pre-trial custody review hearings. In all cases, the persons in custody were released upon giving an undertaking to comply with conditions set by the military judge.

During the reporting period two accused persons were arrested on warrants issued by military judges for failing to appear before the courts martial convened to try them. In both matters, the military judge decided to release the accused with conditions.

Also during the present reporting period, military prosecutors represented the Canadian Forces before two Provincial Mental Health Review Board hearings involving Ex-Master Corporal Clayton Matchee. In both hearings the Mental Health Board determined that Ex-Master Corporal Matchee remained unfit to stand trial.

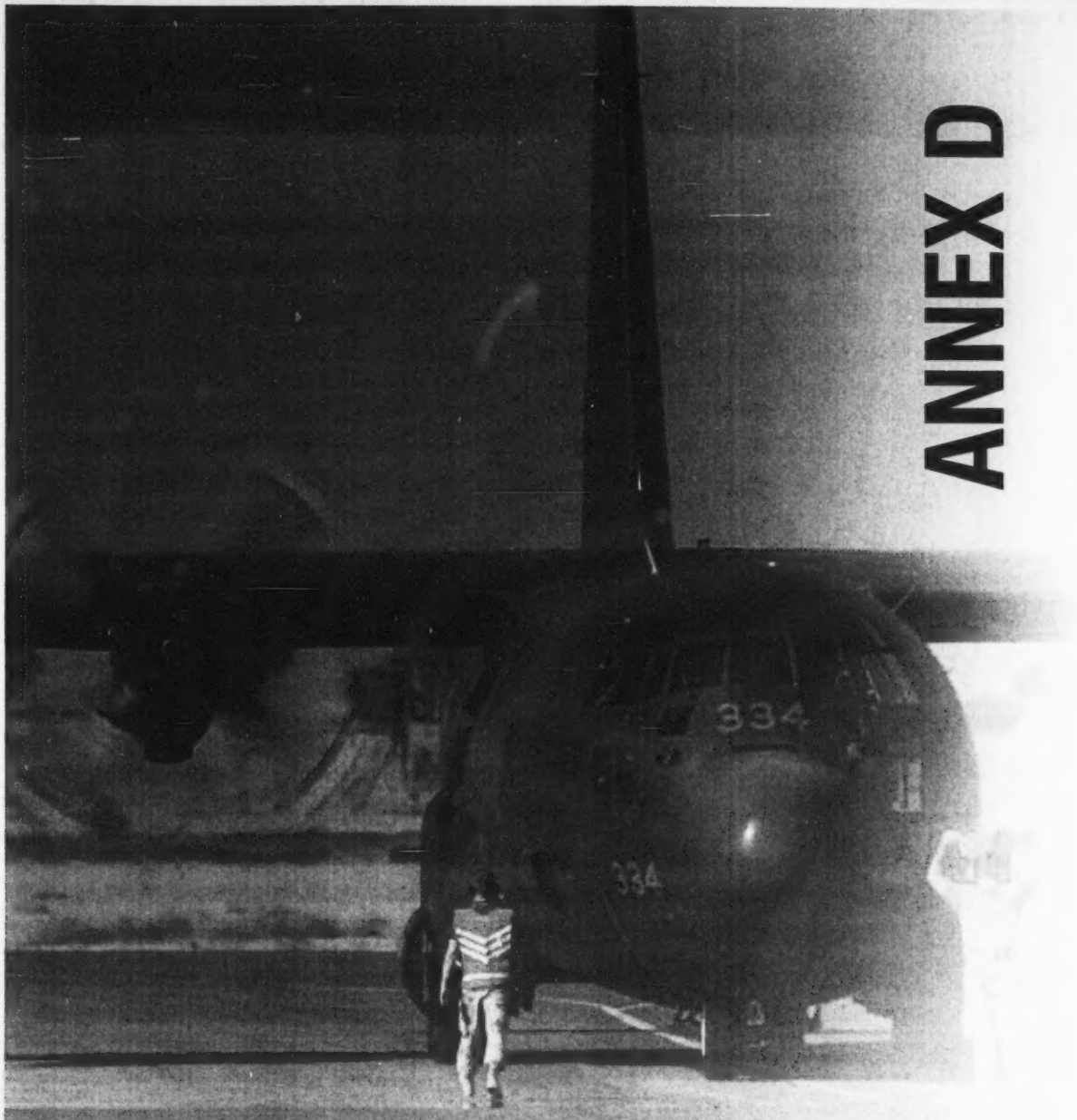
5. DMP Comments

Timeliness of the court martial system is my largest single strategic concern. While reasons for the backlog issue identified in last year's report have been addressed, other factors causing delay have not. The overall timelines at all stages of the court martial process (charges laid to referral, referral to preferral and preferral to start of court martial) have increased in this reporting period, despite concerted efforts by military prosecutors to complete cases in an efficient and timely manner. The delay problem does not spring from a particular point in the court martial process; rather, it has roots throughout the system. The efficiency and effectiveness of the court martial system depends on the efficiency and effectiveness of all the stakeholders involved in the process, including the CF legal community, the military police and the chain of command.

Regardless of the institutional cause, it is axiomatic that a court martial system that fails to deliver prompt but fair justice threatens the ability of commanders to maintain discipline and may have an ultimate impact on the operational effectiveness of the Canadian Forces. It also erodes commanders' confidence in and the credibility of the military justice system.

Court martial delay has been an ongoing challenge for commanders and the CF legal community for many years. There is no one panacea to the problem. However, as DMP I am committed to dedicating the maximum efforts and

resources possible (including contracting with external prosecution experts to assist us) in the upcoming year to identifying those factors within the purview of DMP that are contributing to the delay problem. Clearly, recruiting and retaining an appropriate level of experienced prosecutors within DMP will be a key element in any strategy to address timeliness issues in those areas over which DMP has control. DMP procedures and processes must also be reviewed to determine where improvements can be made. Initiatives to address these factors, as well as others revealed during the identification phase of this plan, will then be developed.



ANNEX D

Annual Report 2006-2007 of the Director of Defence Counsel Services

Prepared by Lieutenant-Colonel Jean-Marie Dugas

Introduction

1. This is the eighth annual report of the Director of Defence Counsel Services (DDCS) presented to the Judge Advocate General (JAG) Brigadier-General K. W. Watkin, under whose general direction I perform my duties. The JAG has shown a marked interest in the military justice system and its efficiency. Some of the initiatives suggested by the JAG have been warmly welcomed, such as the in-depth review of the performance of DCS. These initiatives may lead to both short and long-term improvements in the efficiency of DCS.

2. The format of this document conforms to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 101.20. This report, my fourth as Director, covers the period from 1 April 2006 to 31 March 2007 and contains:

   - An overview of the DCS organization and changes made over the course of the year;
   - A review of DCS duties and responsibilities;
   - A review of the relationships between the Director, the staff and counsel of DCS, the Judge Advocate General (JAG) and the chain of command;
   - An overview of the services provided during the reporting period; and
   - DDCS and DCS general activities.

3. It is clear that this has been a year in which unequal, but increasing, monthly activities have taxed the resources of the defence. The year began with only two military judges available to hear cases. Two subsequent nominations filled the vacant judicial positions. The number of courts martial increased as a result in October and November, and the judicial tempo has not lessened since then. As there are as many judges as regular force military lawyers who regularly appear before courts martial, the DCS reserve budget was adjusted in order to be able to use the services of reserve counsel, which helped to reduce the caseload.

4. The year's activities were as follows:

   a. 140 active court martial files;

   b. 59 courts martial completed, including 8 in French;

   c. 138 days in court;

   d. 1501 instances of advice given to service members and persons subject to the Code of Service Discipline;

   e. 10 cases before the Court Martial Appeal Court;

   f. 3 cases of assistance given to members before appearing before a Board of Inquiry;

   g. 6 interventions during summary investigations;

5. The delegated contractual authority of DCS has been increased, which has permitted speedier decision-making and action. Experts can be retained more rapidly, which promotes rapidity in the scheduling of courts martial. The JAG has given wholehearted support for the increased budgetary requirements of DCS as a result of increased judicial availability.

6. Several complex and essential issues have been submitted to military courts and they had to take sufficient time to consider those issues. Moreover, the renewal "at the last minute" of the mandates of two of the three sitting judges for courts martial, and the refusal to fill the vacant military judge position, has led Defence counsel to make arguments on judicial independence. The validity of renewable mandates for judges and the prerogative of the Crown to select the type of court martial are two of the principal arguments that have been pleaded at first instance and on appeal. Also, the verdict by majority of Disciplinary and General Courts Martial panels is among the issues that have been argued.

7. The process of convening courts martial has been improved, and communications have become easier, since the internal policy of the Court Martial Administrator (CMA) began to make allowance for the plans

of counsel and for consultation between prosecution and defence. The problems that the defence has frequently raised in the past continue to some degree, and consultation with the Court Martial Administrator's office is ongoing. Also, the external review of the different components of the military justice system may help to identify clearly the stages of the process that are causing problems. As the defence occasionally receives files in which courts were convened without notice to DCS, this may lead to a better appreciation of the requirements of the defence in preparing a case for trial.

8. The number of disciplinary files dealt with greatly exceeds the number of courts martial. For example, some cases that were ready for trial were withdrawn following the pre-trial conference, or in open court. Other cases have been suspended by the CMA as a result of lack of judicial availability or because it was no longer possible to find the member that had long retired.

9. A new factor has come into play during this reporting period. As a result of the decision of the Court Martial Appeal Court in *Nystrom*[1], Disciplinary Courts Martial have begun to be convened. This new policy of convening Disciplinary Courts was not solicited by the defence and, in our opinion, is inappropriate. The CMA's policy of convening these courts for blocks of two weeks complicates, and sometimes renders impossible, the participation of all military defence counsel. In fact, this policy has the perverse effect of excluding reserve defence counsel. Efforts will be made through the committees set up on the initiative of the JAG to resolve this problem.

[1] *Nystrom v. The Queen*, CMAC 483 (2005)

DCS Organization

10. The difficulties in recruiting bilingual civilian personnel in DCS remain present. The positions of paralegal and secretary have yet to be filled. The revised classification of certain positions within JAG may facilitate future recruitment.

11. Among the legal officers, a senior lawyer left for a posting as DJA. His position was filled later in the fall. Another lawyer took his release in February 2007. A reserve defence lawyer who has transferred to the Regular Force filled the vacant position. As a result, there is now a vacant reserve position in the western region. Procedures for the recruitment of a new reserve officer are underway.

12. The support of the JAG organization and the informatics team has greatly facilitated our operations. A second round of improvements to our informatics equipment has improved the efficiency of our personnel. The JAG organization has been made aware of the informatics needs of the reserve lawyers, who have very limited access to the National Defence system.

Duties and Responsibilities

13. Our duties and responsibilities under the NDA remain unchanged. The principal activities offered and provided are specified by *Queen's Regulations and Orders for the Canadian Forces* and are summarized as follows:

Legal Counsel Services:

- To detained persons:
  - To persons held in custody, at hearings by a military judge under ss. 159(1) of the NDA to determine retention in custody [QR&O 101.20 (2) (e)].

- To accused persons:
  - At courts martial [QR&O 101.20 (2) (f)];
  - Where there are reasonable grounds to believe that the accused person is unfit to stand trial, at hearings to determine fitness to stand trial [QR&O 101.20 (2) (b)]; and
  - In cases where a finding of unfit to stand trial has been made, at hearings as to the sufficiency of admissible evidence to put the accused person on trial [QR&O 101.20 (3) (c)].
- To persons sentenced by court martial to detention or imprisonment, at hearings for:
  - Release pending appeal [QR&O 101.20 (3) (b)];
  - Review of undertakings for release pending appeal [QR&O 101.20 (3) (b) and 118.23];
  - Cancellation of release pending appeal [QR&O 118.23];
- To the respondent (offender), at Court Martial Appeal Court or Supreme Court of Canada hearings where prosecution authorities appeal the legality of a finding or the severity of a sentence awarded by court martial [QR&O 101.20 (2) (g)].
- To a person on an appeal or an application for leave to appeal to the Court Martial Appeal Court or the Supreme Court of Canada, with the approval of the Appeal Committee [QR&O 101.20 (2) (h)].

Advisory Services:

- To persons arrested or detained in respect of a service offence pursuant to s. 10(b) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), on a 24/7 basis [QR&O 101.20 (2) (a)].
- To assisting officers and accused persons with respect to the making of an election to be tried by court martial pursuant to QR&O 108.17 and 108.18 [QR&O 101.20 (2) (d)].
- To assisting officers or accused persons on matters of a general nature relating to summary trials [QR&O 101.20 (2) (c)].

- To persons subject to an investigation under the Code of Service Discipline, a summary investigation or a board of inquiry [QR&O 101.20 (2) (i)].

Relationship between DCS, DCS personnel, The Judge Advocate General and the Chain of Command

14. The openness of the JAG to the needs of the defence has created a much different dynamic this year. Regular meetings between the JAG and DCS promote positive developments in administrative and other matters relating to the military justice system. The intent is to insure that persons subject to the Code of Service Discipline *are* dealt with minimum *delay*.

15. Pursuant to his authority under ss. 249.2 of the NDA, the JAG has not issued guidelines of general application to DCS military lawyers during this reporting period.

16. Officers in the chain of command have intervened inappropriately in some cases. In one case, a General wrote directly the Chief Military Judge and enunciated his particular interest in proceeding rapidly in a particular case involving an officer. In another case, a superior officer sent an e-mail to the chain of command requesting an intervention against the decision of the Court Martial Administrator to request him as a member of a panel at an upcoming Disciplinary Court Martial.

Professional Development

17. DCS counsel received support for professional training at the national level with the participation of all Regular Force counsel and one reserve lawyer in the "Canadian Criminal Law Program." DDCS, for his part, participated in training in international criminal law. Apart from

their membership in the Canadian Bar Association and their respective provincial bars, the DCS Regular Force lawyers are members of the International Criminal Defence Attorneys Association. The Deputy Minister's approval for membership of the five Regular Force counsel in the Criminal Lawyers Association has also been sought and approved.

18. DCS counsel participated in an advanced training course for counsel practicing in the military justice system. The participants appreciated this new opportunity for continuing legal education.

The Budget

19. The increased assignment of reserve counsel in order to address the problem of delay in courts martial has necessitated the reorganization of the defence budget. However, it remains within the initial allocation.

20. The financial authority of DCS has increased from $5,000 to $75,000. This allows DCS to avoid seeking external approval for medical expertise required at court martial. External approval is still required for contracts for the services of civilian lawyers in situations in which the defence must be undertaken by civilian counsel. The applicable regulation is contrary to the provisions of the NDA, which permits DCS to enter into contracts in this regard. Steps have been taken to correct this situation. The JAG has also accepted our request to put in place an independent functional structure for civilian defence counsel interested in practicing military law before courts martial.

21. The defence now assumes supplementary charges for transcribing witnesses' statements, formerly assumed by Military Police and Prosecution at the time of disclosure. These costs are quite substantial and can no longer be ignored in the budgetary process.

22. The place of residence of accused who have become civilians or of service members posted to a region other than the one in which the court martial will be held is one of the elements that affect the

professional relationship between counsel and accused. This element has a large impact on the operational costs of DCS since it requires additional travel by the lawyers. Also, with the passage of time, difficulties in finding witnesses and local resources sometimes make the task of representing the accused particularly complex.

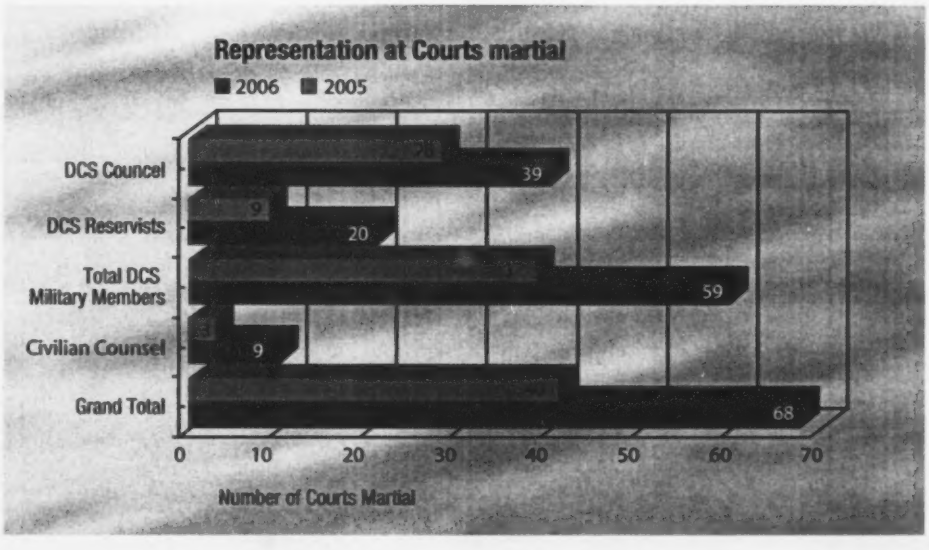
Services Provided

Counsel Services

Courts martial

23. When facing a court martial, an accused person has the right to be represented by DCS counsel at public expense, may retain legal counsel at his or her own expense, or may choose not to be represented.

24. 59 courts martial involving DCS commenced during the reporting period. One trial is underway and will be recorded in the next fiscal year. Of the 59 cases included in the following chart, a civilian counsel retained by DCS conducted one. The sources of representation at court martial are as follows:



25. Pursuant to the authority granted under ss. 249.21(2) of the NDA, the Director of Defence Counsel Services may hire, at public expense, civilian counsel on a temporary basis to provide assistance. This authority is currently exercised only in cases where, having received a request for representation by DCS counsel, no member of the DCS office can represent the particular individual because of a conflict of interest. Reliance on civilian counsel poses two major difficulties: firstly, there are few who have suitable expertise (which leads to a continual conflict with the standards for awarding contracts); secondly, where an inexperienced counsel demonstrates interest, the DDCS must indirectly assume the costs of their professional development in military law, not counting the time spent furnishing them with documents and the minimum of references. The Office of the JAG, in collaboration with DCS, is in the process of addressing this situation.

26. As demonstrated in the chart above, the involvement of Reserve defence counsel is still very much sought after, as a direct result of the change in personnel and of the need for experience in disciplinary matters. This year, account must also be taken of the need to deal with the backlog in courts martial. DCS reserve counsel constitutes a precious and essential resource.

Court Martial Appeal Court of Canada (CMAC)

27. Ten appeals involving DCS counsel came before the CMAC during the period 2006-2007. Three came from the previous fiscal year and the others entered during the current reporting period. One appellant abandoned his appeal one week before the hearing of his appeal.

28. Appellants submitted requests for legal representation by DCS before the Court Martial Appeal Court of Canada to the Appeal Committee in accordance with article 101.20(2)(h) of QR&O. These files, except for one in which there was a cross-appeal by the prosecution, required the approval of the Committee. One request was rejected for "lack of professional merit" and the file is still at the court registry.

29. DCS counsel were involved in the following appeals during the reporting period:

- **Ballard** – The appellant appealed his conviction for drug trafficking. The court rejected the appeal on the ground that it was not convinced that a serious error permitting the court to intervene had been committed.
- **Griffith** – The member, represented by civilian counsel at the court martial, has requested the Appeal Court to quash his guilty plea and to order a new trial. The Appeal Committee granted his request for DCS representation. The member withdrew his appeal shortly before his appeal was to be heard.
- **Dunphy** – Appealed from the trial judge's dismissal of his Charter motion challenging the independence of military judges. While the CMAC accepted the validity of the appellant's constitutional arguments, no remedy was granted.
- **Parsons** – After the defence counsel had made his final address, and the trial judge had retired to consider his decision, the trial judge recalled the accused and cross-examined him. The appeal court granted the accused's appeal and ordered a stay of proceedings.
- **Legresley** – Has entered an appeal of the court's decision rejecting his motion for unreasonable delay, and also concerning the court's finding of guilty on the charge of drug trafficking.
- **Kennedy** – Has entered an appeal of his conviction based on the linguistic difficulties of the trial judge, and on the ground that the evidence did not support the finding and also on the misapplication of the doctrine of reasonable doubt with respect to the accused's testimony.
- **Grant** – Has entered an appeal with respect to the court's rejection of his pre-trial motions under ss. 7 and 11(b) of the Charter, and also with respect to the finding of guilt on the grounds of misapprehension of the evidence and of failure to provide sufficient reasons for the finding.

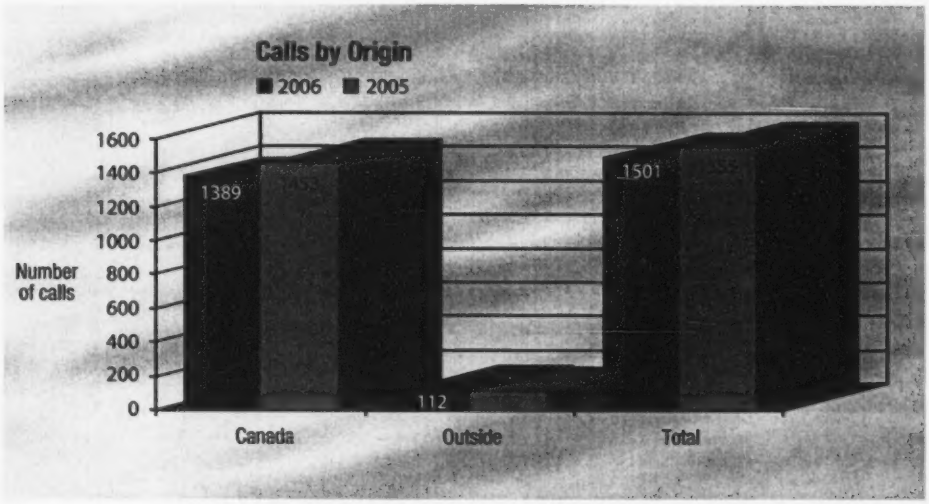
- **Trépanier** – Has entered an appeal of the court's decision rejecting his pre-trial application based on the decision of the CMAC in the *Nystrom* case, which dealt with the right of the accused to choose the type of court martial.
- **Taylor** – In his Notice of Appeal has requested the CMAC to rule on the notion of public interest to pursue charges in this matter and on the authority of the trial judge to reject a joint submission on sentence without advising counsel for the prosecution and defence.
- **McRae** – As in the Trépanier case, has requested the CMAC to rule on the question of the accused's choice of mode of trial. He has also appealed the legality of the verdict on the grounds of misapplication of the doctrine of reasonable doubt with respect to the evidence of the accused, and on the court's interpretation of the mens rea required.

Advisory Services

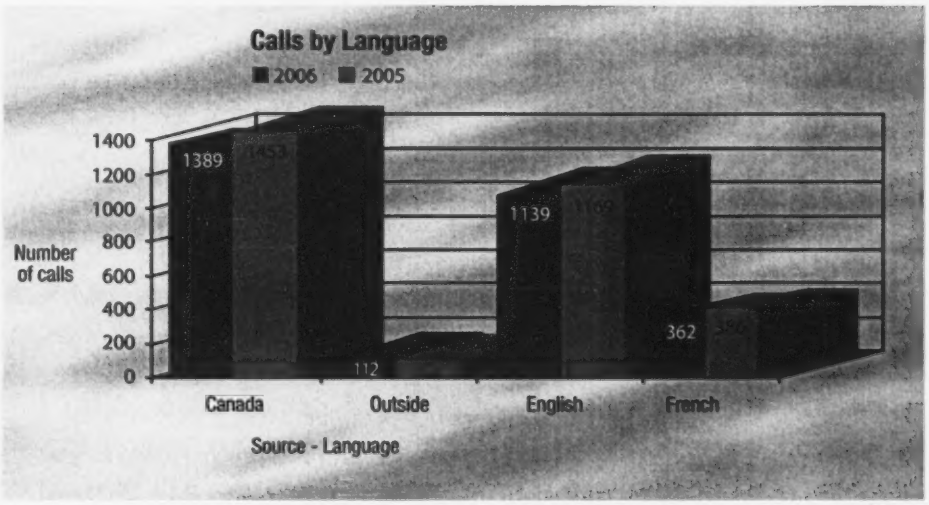
30. Bilingual service is available without cost, at any time and without interruption for all service members and others subject to the Code of Service Discipline serving anywhere in the world. DCS counsel provide verbal and written communications through a toll-free number that is distributed throughout the CF, a regular telephone number and via email, the popularity of which is growing. The problem was reported and has been resolved. Usage was distributed as follows:

- 1-800 access line to ensure access to legal advice upon arrest or detention; it is provided to military police and other CF authorities likely to be involved in investigations of a disciplinary or criminal nature.
- Standard direct telephone access, available to accused persons subject to the *Code of Service Discipline*, for advice in relation to an election between court martial and summary trial, or questions on other disciplinary matters, or all other matters authorized under the QR&O.
- Email remains an avenue frequently used in initiating contact or obtaining information.

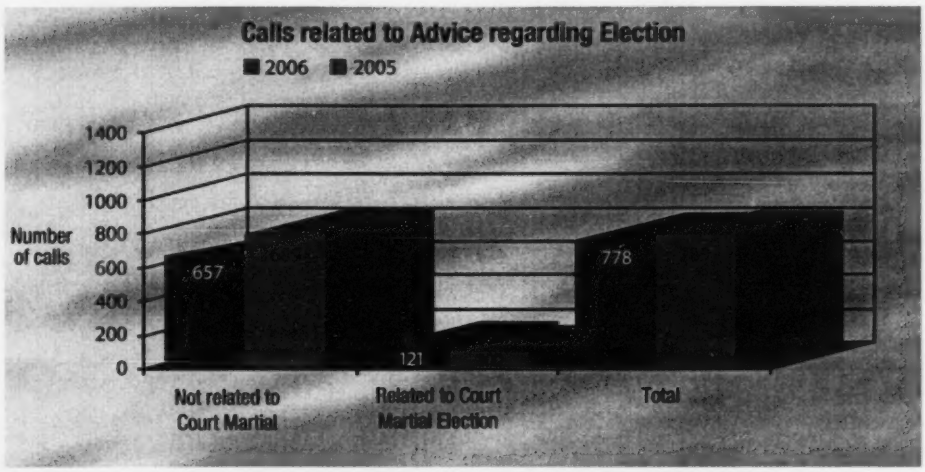
31. During the reporting period, DCS counsel handled a total of 1,501 calls. The calls ranged in duration but, on average, were approximately 15 minutes. This undertaking totalled nearly 375 hours, similar to the previous year. The origin of the calls is illustrated in the following graph:



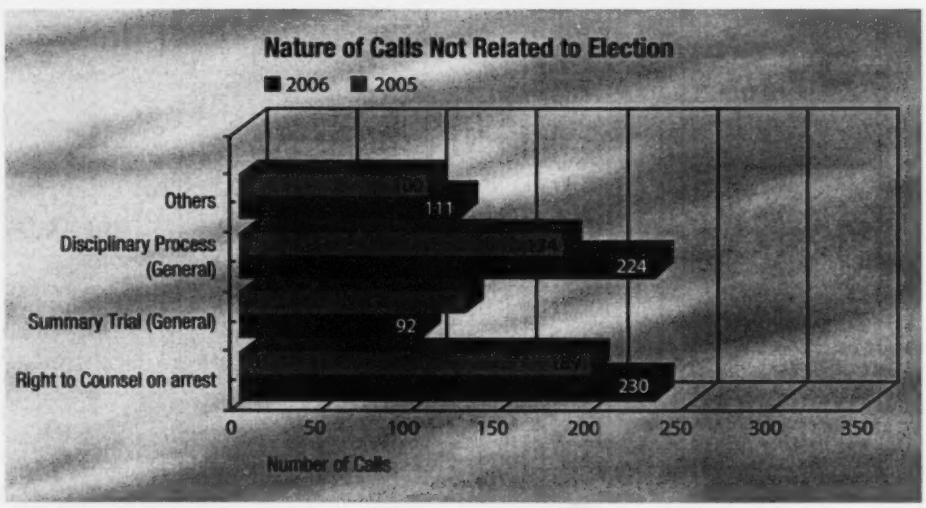
32. We have also tabulated the official language used by the accused, illustrated in the following graph:



33. The graph below shows the proportion of calls related to advice regarding the election of an accused between court martial or summary trial. It includes calls that were not related to this subject:



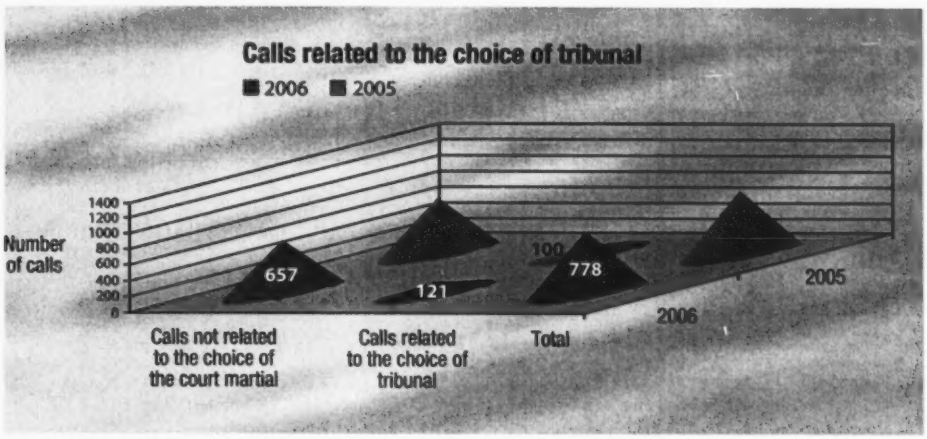
34. Similarly, this graph shows the nature of calls that were not related to the election of an accused between court martial or summary trial:



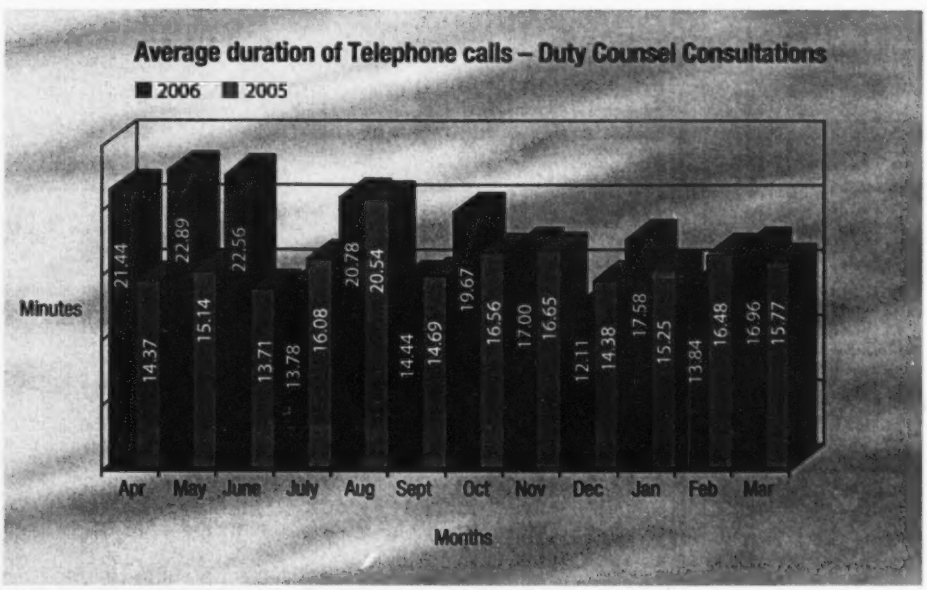
The *others* portion of the above graph refers to subjects such as the court martial process in general, redress of grievance and release from the CF. While DCS is not specifically mandated to advise on administrative matters, the duty counsel numbers which are widely distributed are also used for

seeking advice on those subjects. In such situations, DCS counsel provide advice as to the mechanics of the process, but do not get involved in the merits of the matter.

35. The following data demonstrate the proportion of phone calls made in order to obtain advice on the choice between CM and summary trial to calls that were not directly related to the choice of military tribunal:



36. Data compiled during the year allow us to track the regularity and variations of telephone services provides to DCS' clients:



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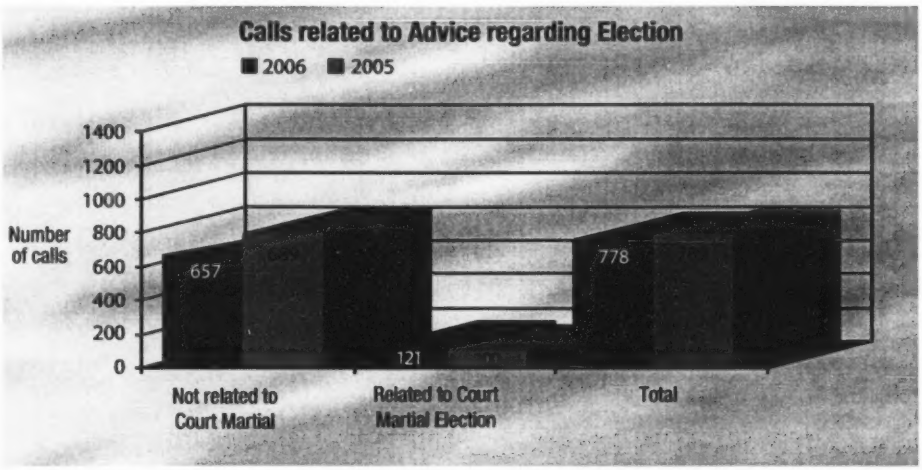

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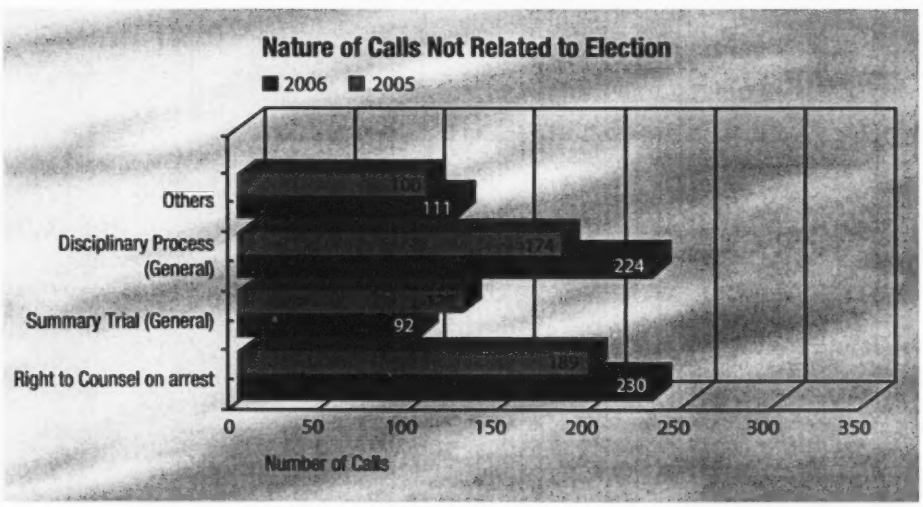

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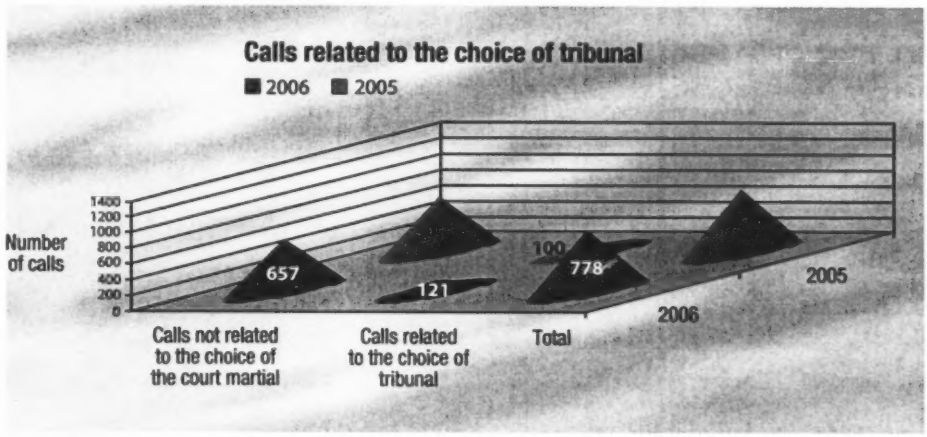

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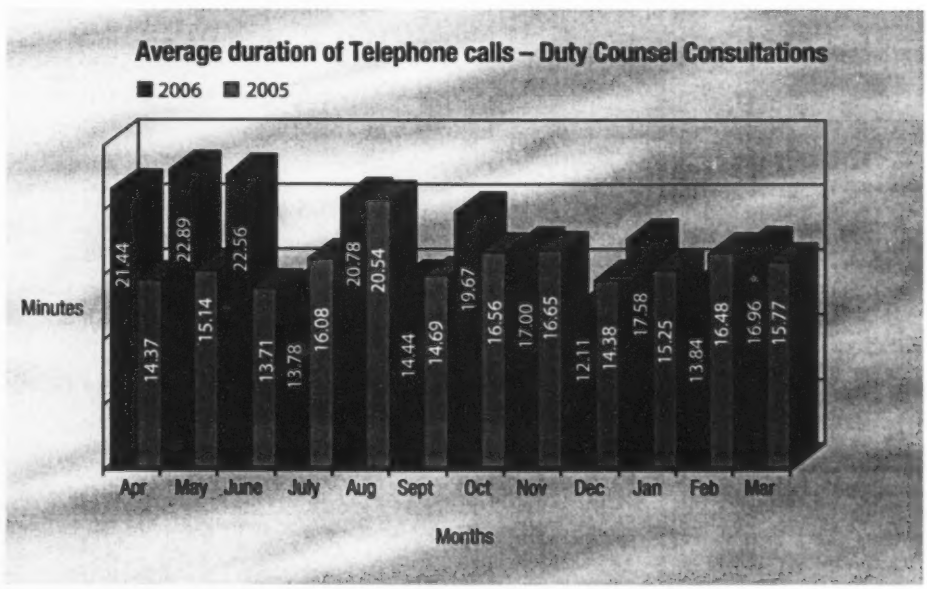


37. As the collected data indicate, the advisory services of DCS remain the dominant aspect of our work. Operational deployments and their related activities lead every day to numerous demands, of increasing complexity, for legal assistance. The participation of large numbers of reservists adds to this complexity. This essential service contributes to the protection of the fundamental rights of service members and others subject to the Code of Service Discipline.

38. The 24-hour duty counsel line indicates an ignorance of rights and obligations, as well as a fear (founded or not) of reprisals. DCS is studying the possibility of offering more information on our website, which is under reconstruction. The intervention of DCS counsel has sometimes prevented the worsening of certain disciplinary situations.

General Activities & Comments

39. As I observed in my last report, if the levying of fines before the end of proceedings in the Court of Appeal is administratively convenient, it is nonetheless often a heavy burden for the offender that must provide right away. This situation seems unjustified and the procedure should be modified to delay the entry into force of such a sentence.

40. Our services were required on occasion with respect to Boards of Inquiry (BOI) and summary investigations (SI). However, considering the numbers of BOI and SI that are held every year, we receive relatively few requests for advice. We will insure that our services in that domain are better known.

41. A hearing was held pursuant to QR&O 101.20 (3)(c) in order to determine whether there was sufficient admissible evidence to order the accused to stand trial. The hearing was related to events in Somalia, and the former member was originally declared unfit to stand trial. The status of this ex-military member has been extended for another six months in order to finalize the measures required for a final

evaluation. A hearing is expected in July 2007. Changes to the NDA, necessitated by a decision of the Supreme Court of Canada on this issue, are expected.

42. Regulations concerning the legal representation of service members accused of criminal offences before foreign courts have reached the stage of legislative drafting.

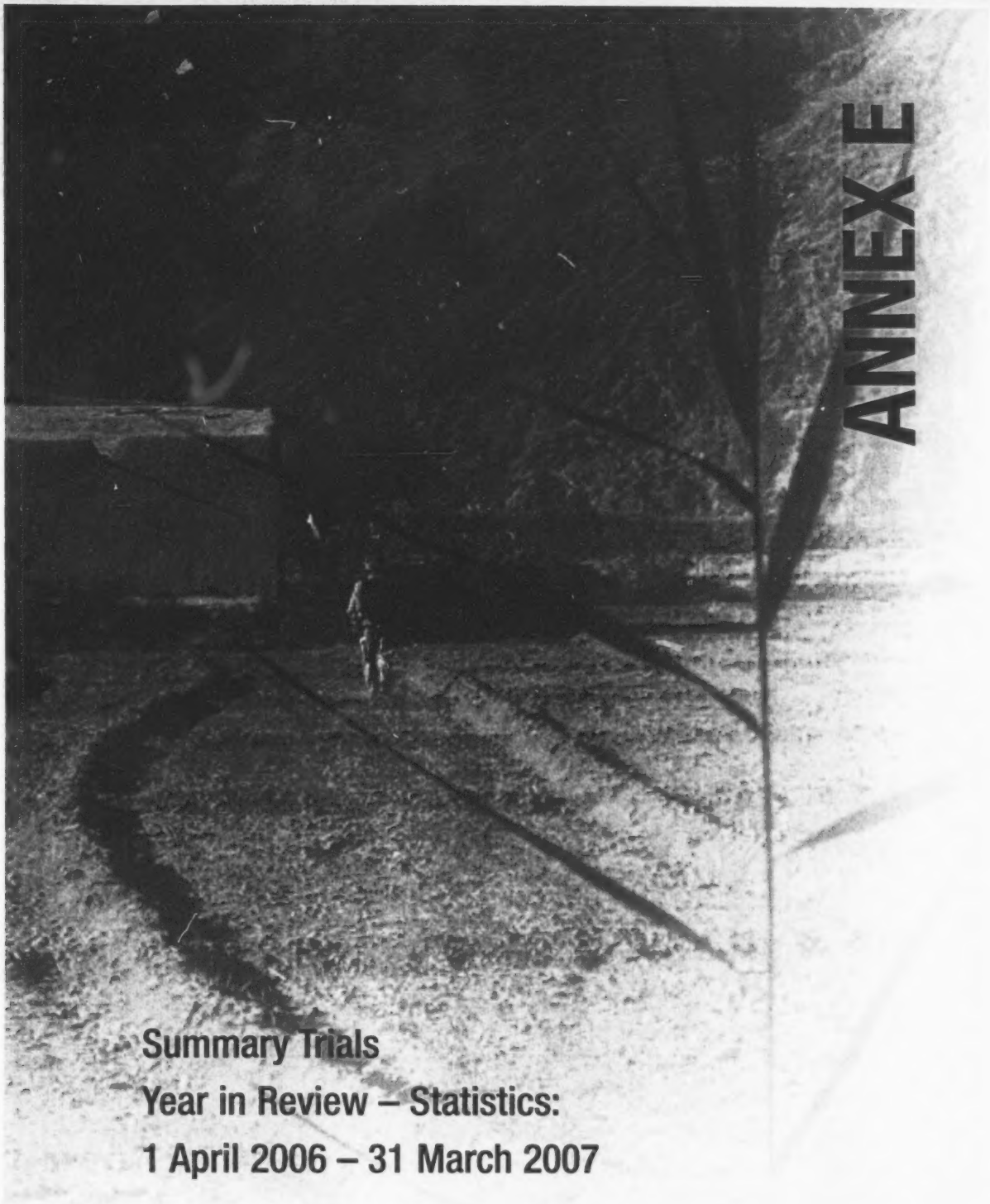
43. DDCS continues to administer the legal assistance funds allocated to military members accused abroad, but no activity has been required. The administration of this file is in accordance with Canadian Forces Administrative Order 111-2 – Employment of Civilian Defence Counsel in Foreign Criminal Court.

Conclusion

44. The first objective of the lawyers of Defence Counsel Services is to allow their clients to obtain justice with the minimum of delay. The human and financial resources provided during this year and the flexibility of the JAG financial services have greatly facilitated our efforts. Although several members had already left the CF by the time of trial, it must be admitted that there has been a real improvement in this regard. We have also noted a general desire to deal promptly with disciplinary matters.

45. Over the coming year DCS will concentrate its efforts on pre-trial procedures. The introduction of rigid standards, policies and administrative directions in this area, such as the requirement of two weeks for every Disciplinary Court Martial, detracts from the principles of transparency and judicial impartiality. If the departure from these principles is too marked, it could affect procedural fairness and hence the right to make full answer and defence. Discussions on the flexible application of such policies are underway.

46. As I announced in my last annual report, I have requested a second mandate as Director of Defence Counsel Services. The present four-year mandate expires in the month of August 2007. I have made this choice based on the achievements of Defence Counsel Services during this mandate.



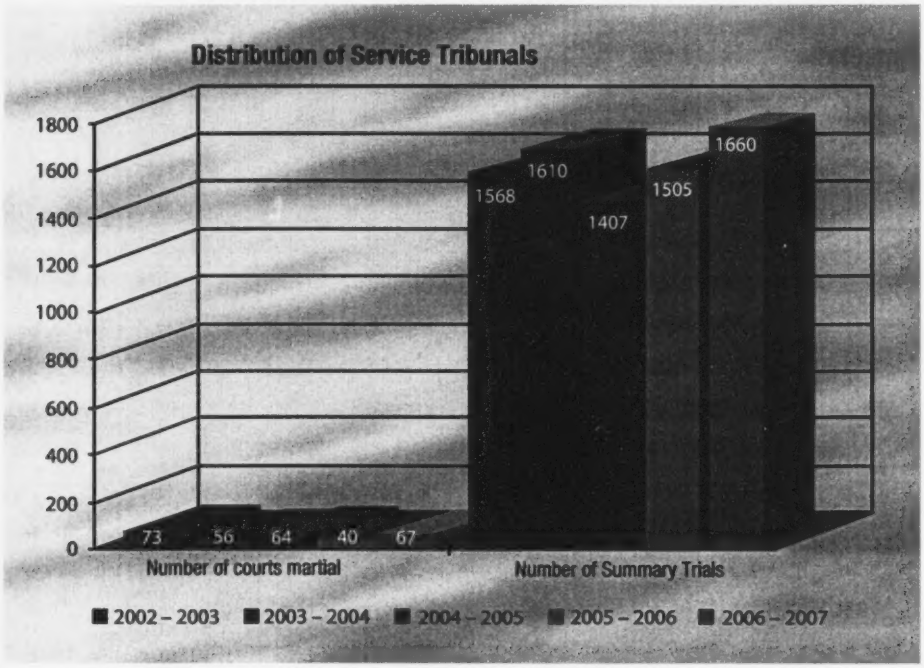
ANNEX E

Summary Trials
Year in Review – Statistics:
1 April 2006 – 31 March 2007

Summary Trials Reporting Period 1 April 2006 – 31 March 2007

Distribution of Service Tribunals

	2005-2006 #	2005-2006 %	2006-2007 #	2006-2007 %
Number of courts martial	40	3	67	4
Number of summary trials	1505	97	1660	96
Total	**1545**	**100**	**1727**	**100**



Election to Court Martial

	2006-2007 #	2006-2007 %
Number of cases where member was offered the right to be tried by court martial	493	100
Number of persons electing court martial when offered	38	7.71

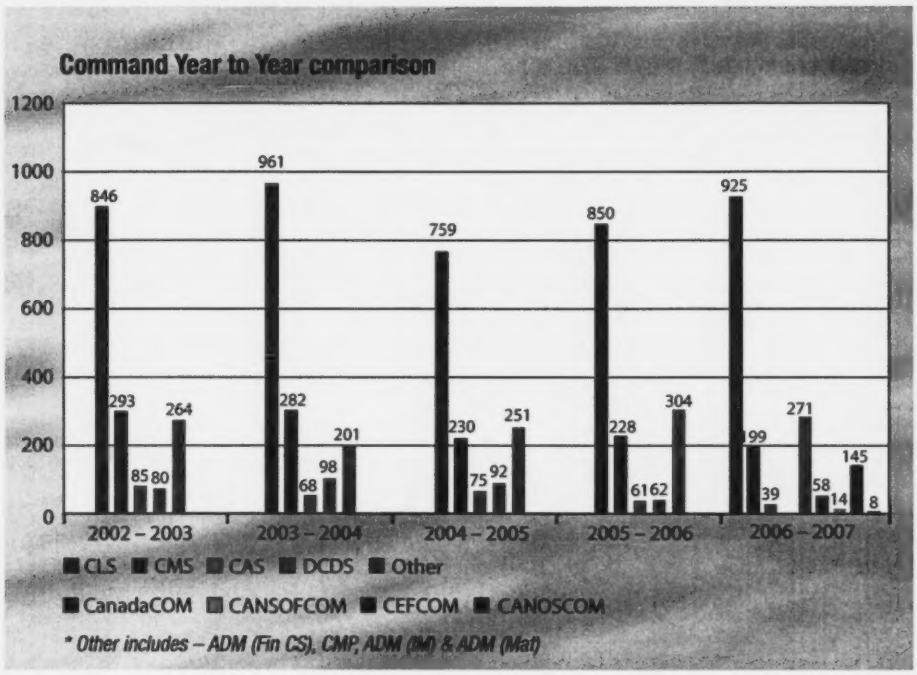
Language of Summary Trials

	2005-2006		2006-2007	
	#	%	#	%
Number in English	1191	79	1253	76
Number in French	314	21	407	24
Total	**1505**	**100**	**1660**	**100**

Note: (1) The statistics in this annex are current as of 7 June 2007.
(2) For statistics relating to prior years, refer to previous JAG Annual Reports.

Command

	2005-2006		2006-2007	
	#	%	#	%
Vice Chief of the Defence Staff (VCDS)	0	0.00	1	0.06
Canada Command (Canada COM)	N/A	N/A	58	3.49
Canada Operational Support Command (CANOSCOM)	N/A	N/A	8	0.48
Canada Special Forces Command (CANSOFCOM)	N/A	N/A	14	0.12
Canada Expeditionary Force Command (CEFCOM)	N/A	N/A	145	8.73
Deputy Chief of Defense Staff	62	4.12	N/A	N/A
Chief of the Maritime Staff (CMS)	228	15.15	199	11.99
Chief of the Land Staff (CLS)	850	56.48	925	55.72
Chief of the Air Staff (CAS)	61	4.05	39	2.17
Associate Deputy Minister (ADM (Fin CS)) (Finance and Corporate Services)	0	0.00	2	0.12
Chief Military Personnel (CMP)	286	19.00	250	15.06
Associate Deputy Minister (ADM (IM)) (Information Management)	16	1.07	16	0.96
Associate Deputy Minister (ADM (Mat)) Materiel)	2	0.13	3	0.18
Total	**1505**	**100**	**1660**	**100**



Rank of Accused

	2005-2006		2006-2007	
	#	%	#	%
Private and Corporal (includes Master-Corporal*)	1275	85	1449	87
Sergeant to Chief Warrant Officer	67	4	74	4
Officer	163	11	137	8
Number of cases	**1505**	**100**	**1660**	**100**

** Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.*

Findings by Charge

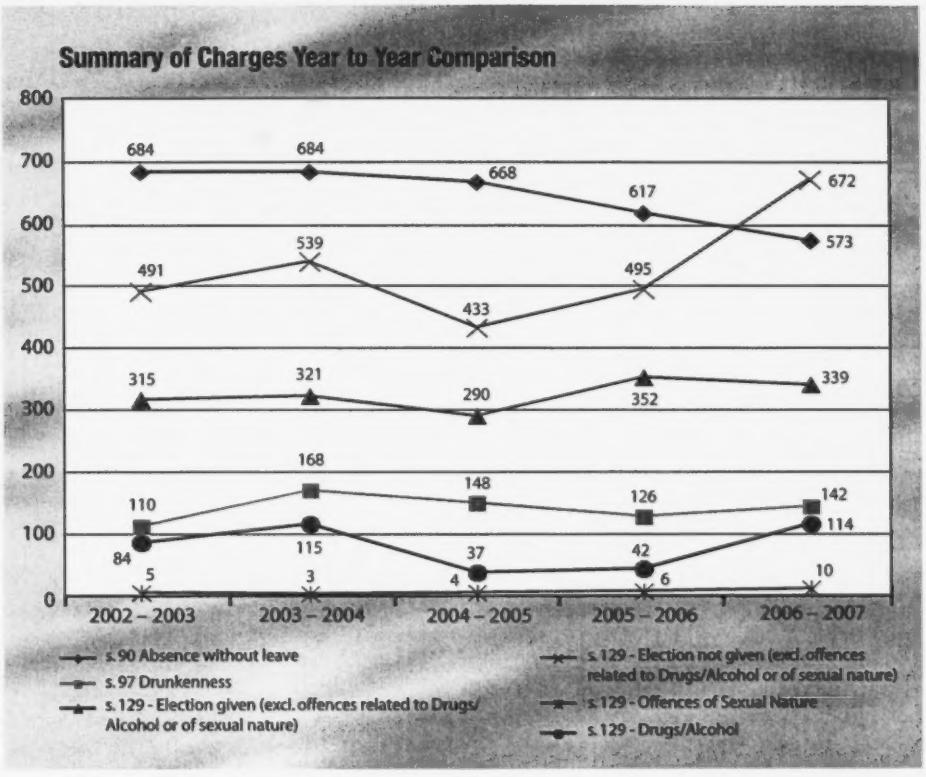
	2005-2006 #	2005-2006 %	2006-2007 #	2006-2007 %
Guilty	1723	89.09	1906	90.76
Guilty – Special Finding	6	0.31	4	0.19
Guilty of included charges	3	0.16	6	0.29
Not guilty	134	6.93	137	6.52
Charge stayed	60	3.10	35	1.67
Charge not proceeded with	8	0.41	12	0.57
Total	**1934**	**100**	**2100**	**100**

Summary of Charges

Article	Description	2005-2006 #	2005-2006 %	2006-2007 #	2006-2007 %
83	Disobedience of lawful command	51	2.64	62	2.95
84	Striking or offering violence to a superior	3	0.16	4	0.19
85	Insubordinate behaviour	79	4.08	59	2.81
86	Quarrels and disturbances	25	1.29	28	1.33
87	Resisting or escaping from arrest or custody	1	0.05	0	0
90	Absence without leave	617	31.90	573	27.29
91	False statement on Respect of Leave	1	0.05	0	0
93	Cruel or disgraceful conduct	0	0.00	4	0.19
95	Abuse of subordinates	5	0.26	5	0.24
97	Drunkenness	126	6.51	142	6.76
98	Malingering or maiming	1	0.05	0	0
101	Escape from Custody	2	0.10	2	0.10
101.1	Failure to comply with conditions	2	0.10	0	0
102	Hindering Arrest or Confinement or Withholding Assistance when called on	1	0.05	0	0
108	Signing Inaccurate Certificate	0	0	1	0.05

Summary of Charges

Article	Description	2005-2006 #	2005-2006 %	2006-2007 #	2006-2007 %
111	Improper driving of vehicles	8	0.41	4	0.19
112	Improper use of vehicles	18	0.93	12	0.57
113	Causing Fire	0	0	1	0.05
114	Stealing	16	0.83	18	0.86
115	Receiving	0	0	1	0.05
116	Destruction, damage, loss or improper disposal	11	0.57	6	0.29
117	Miscellaneous offences	29	1.50	7	0.33
118	Failure to appear or attend	1	0.05	1	0.05
124	Negligent performance of military duty	0	0	1	0.05
128	Conspiracy	0	0.00	1	0.05
129	Conduct to the prejudice of good order & discipline – Offences of sexual nature	6	0.31	10	0.48
129	Conduct to the prejudice of good order & discipline – Drugs/Alcohol	42	2.17	114	5.43
129	Conduct to the prejudice of good order & discipline – election to be tried by CM Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	352	18.20	339	16.14
129	Conduct to the prejudice of good order & discipline – election to be tried by CM not Given (excl. cases reported in 129-Offences of sexual nature & 129-Drugs/Alcohol)	495	25.59	672	32.00
130	Service trial of civil offences	42	2.17	33	1.57
Number of charges		**1934**	**100**	**2100**	**100**



Authority

	2005-2006		2006-2007	
	#	%	#	%
Delegated Officer	1056	70	1259	75
Commanding Officer	397	26	315	19
Superior Commander	52	4	86	5
Total	**1505**	**100**	**1660**	**100**

Punishments

	2005-2006 #	2005-2006 %	2006-2007 #	2006-2007 %
Detention (suspended)	14	0.73	9	0.44
Detention	36	1.88	23	1.10
Reduction in rank	3	0.16	7	0.33
Severe reprimand	1	0.05	4	0.19
Reprimand	44	2.30	50	2.39
Fine	1081	56.48	1303	62.20
Confinement to ship or barracks	514	26.85	444	21.19
Extra work and drill	95	4.96	120	5.73
Stoppage of leave	46	2.40	83	3.96
Caution	80	4.18	52	2.48
Total	**1914**	**100**	**2095**	**100**

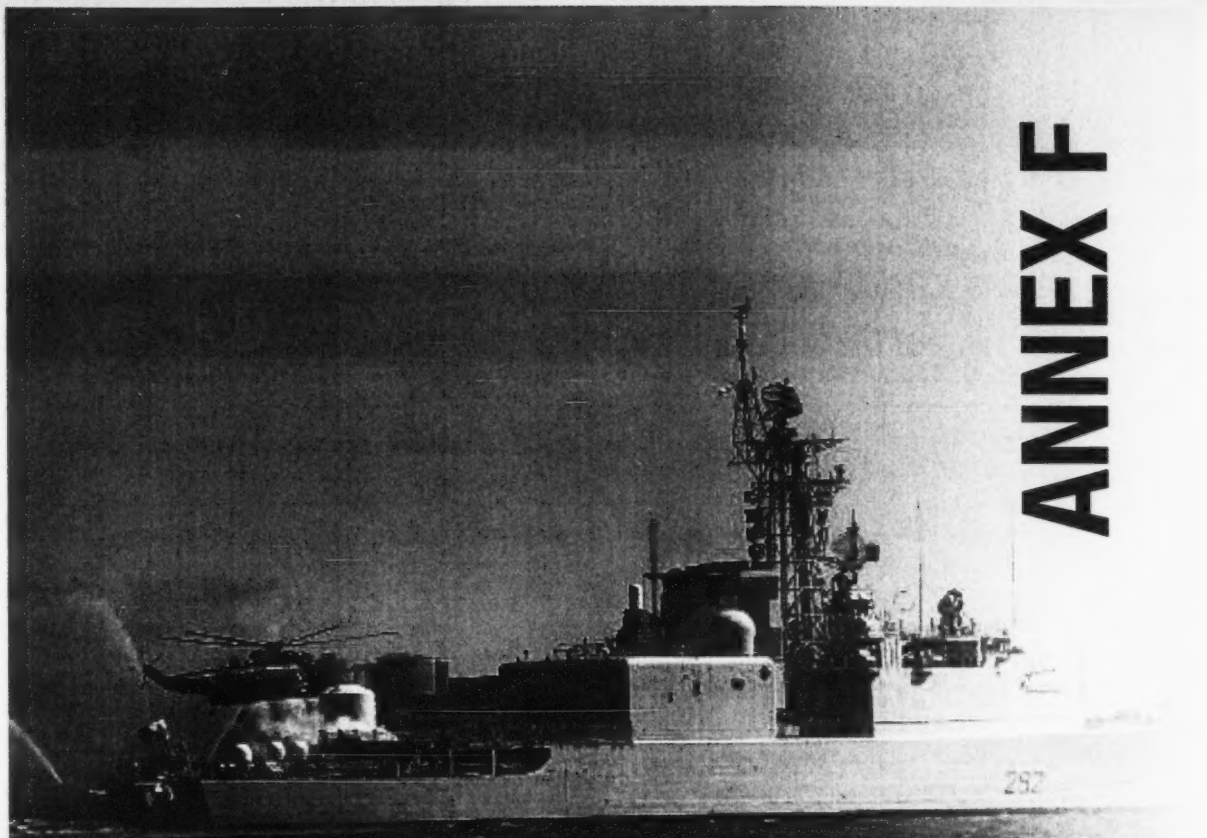
Note: More than one type of punishment may be awarded in a sentence

Requests for Review

	2005-2006 #	2005-2006 %	2006-2007 #	2006-2007 %
Requests for review based on finding	4	11	5	22
Requests for review based on sentence	13	36	4	18
Requests for review based on finding & sentence	19	53	13	59
Total	**36**	**100**	**22**	**100**

Decision of Review Authority

	2005-2006 #	2005-2006 %	2006-2007 #	2006-2007 %
Upholds decision	13	36	11	50
Quashes / substitutes findings	14	39	9	41
Substitutes punishment	8	22	0	0
Mitigates / commutes / remits punishment	1	3	2	9
Total	**36**	**100**	**22**	**100**



ANNEX F

Courts Martial
Year in Review – Statistics:
1 April 2006 – 31 March 2007

Court Martial Reporting
Period 1 April 2006 – 31 March 2007

Number of Courts Martial

	2005-2006 #	2006-2007 #
Number of courts martial	40	67*

** This figure comprises 1 joint trial, which tried 2 accused.*

Courts Martial By Type

	2005-2006 #	2005-2006 %	2006-2007 #	2006-2007 %
Standing Court Martial	40	100%	61	91%
Disciplinary Court Martial	0	0%	6	9%
General Court Martial	0	0%	0	0%
Special General Court Martial	0	0%	0	0%
Total	**40**	**100%**	**67**	**100%**

Summary of Charges

NDA Section / Offences	Description	2005-2006 #	2006-2007 #
83	Disobeying a lawful command	5	9
84	Striking or offering violence to a superior officer	2	1
85	Insubordinate behaviour	4	1
86	Quarrels and disturbances	2	4
86 (a)	Quarrels or fights with any person who is subject to the CSD	1	0
87 (d)	Broke out of Barracks	0	1
88	Desertion	0	1
90	Absent without leave	9	16
93	Cruel or disgraceful conduct	4	1
95	Abuse of subordinates	2	7

Summary of Charges

NDA Section / Offences	Description	2005-2006 #	2006-2007 #
96	False accusations	0	1
97	Drunkenness	7	11
98(a)	Malingering	0	0
101.1	Failure to comply with conditions	16	0
102(a)	Resisting a NCM performing an arrest	0	0
113	Causing fires	0	1
114	Stealing	5	3
115	Receiving	0	1
116	Destruction, damage, loss or improper disposal	0	3
117(f)	An act of a fraudulent nature	4	16
122	False answers or false information	0	0
124	Negligent performance of a military duty	0	1
125(a)	Wilfully (or negligently) made a false entry	2	5
125(c)	Suppressed or altered a military document with intent to deceive	0	0
129	An act to the prejudice of good order and discipline	11	13
129	Conduct to the prejudice of good order and discipline	18	18
129	Neglect to the prejudice of good order and discipline	0	3
130 (4(1) CDSA)*	Possession of substances	2	7
130 (5(1) CDSA)	Trafficking of substances	12	8
130 (7 CDSA)	Production of substance	0	1
130 (82(1) CC)**	Possession without lawful excuse of an explosive	5	0
130 (86(1) CC)	Careless use of a firearm	0	2
130 (87 CC)	Pointing a firearm	0	2
130 (91(2) CC)	Unauthorized possession of prohibited weapon	0	3
130 (122 CC)	Breach of trust by public officer	3	0

Summary of Charges

NDA Section / Offences	Description	2005-2006 #	2006-2007 #
130 (129 CC)	Resisting a peace officer	3	0
130 (139(2) CC)	Obstruction of justice	0	0
130 (140(1) CC)	Public Mischief	2	0
130 (153 CC)	Sexual Exploitation	0	1
130 (163.1(4.1)) CC)	Accessing Child Pornography	3	0
130 (163.1(4) CC)	Possession of child pornography	2	4
130 (173(1) CC)	Committed an indecent act	1	1
130 (253(b) CC)	Operating while impaired	0	0
130 (264(1) CC)	Criminal harassment	1	8
130 (264.1 (1) CC)	Uttering threats	0	0
130 (266 CC)	Assault	6	10
130 (267(a) CC)	Assault with a weapon	0	0
130 (267(b) CC)	Assault causing bodily harm	1	4
130 (268 CC)	Aggravated assault	0	2
130 (269 CC)	Unlawfully causing bodily harm	0	1
130 (270(1) CC)	Assaulting a Peace Officer	1	0
130 (271 CC)	Sexual assault	7	10
130 (272(1)(c) CC)	Sexual assault causing bodily harm	0	0
130 (279 CC)	Kidnapping, forcible confinement, hostage taking	2	0
130 (342 CC)	Theft, forgery, etc., of a credit card	3	0
130 (346 (1.1) (b) CC)	Extortion	0	1
130 (348 CC)	Breaking and entering with intent, committing offence or breaking out	3	0
130 (354 (1) CC)	Possession of property obtained by crime	3	0
130 (362(1)(a) CC)	False pretences	1	2

Summary of Charges

NDA Section / Offences	Description	2005-2006 #	2006-2007 #
130 (366(1) CC)	Forgery	0	4
130 (368 CC)	Uttering a forged document	1	5
130 (380 (1) CC)	Fraud	4	1
130 (464 CC)	Counselling an offence	0	1
Total Offences		**158**	**195**

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.

** Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA].*
*** Criminal Code, R.S., 1985, c. C-46 [CC].*

Disposition by Case

	2005-2006 #	2005-2006 %	2006-2007 #	2006-2007 %
Found/Plead Guilty to at least one charge	34	87%	57	84%
Not Guilty of all charges	5	13%	7	10%
Stay of Proceedings on all charges	0	0%	1	2%
Withdrawal of all charges at court martial	1	0%	3	4%
Other (NDA section 202.12)	0	0%	0	0%
Total	**40**	**100%**	**68**	**100%**

Sentences

Punishment Type	2005-2006	2006-2007
Dismissal	0	0
Imprisonment	8	8
Detention	2	3
Reduction in Rank	4	3
Forfeiture of Seniority	0	1
Severe Reprimand	6	9
Reprimand	9	19
Fine	27	49
Minor punishments: Confined to Barracks	0	1
Extra Work and Drill	0	0
Stoppage of leave	0	0
Caution	0	0
Total	**56**	**93**

NOTE: More than one type of punishment can be included in a sentence.

Language of Trial

	2005-2006		2006-2007	
	#	%	#	%
English	29	73%	54	81%
French	11	27%	13	19%
Total	**40**	**100%**	**67**	**100**

Courts Martial By Command

	2005-2006		2006-2007	
	#	%	#	%
National Defence Headquarters	8	20%	10	15%
Deputy Chief of the Defence Staff	3	7%	N/A	N/A
Chief of the Maritime Staff	7	18%	11	17%
Chief of the Land Staff	17	42%	30	45%
Chief of the Air Staff	4	10%	11	17%
Canadian Defence Academy	1	3%	1	1%
Canada Command	N/A	N/A	1	1%
Canadian Expeditionary Force Command	N/A	N/A	2	3%
Canadian Operational Support Command	N/A	N/A	1	1%
Canadian Special Operations Forces Command	N/A	N/A	0	0%
Total	**40**	**100%**	**67**	**100%**

NOTE: The Deputy Chief of the Defence Staff organisation was disbanded in 2006. Units that were belonging to the Deputy Chief of the Defence Staff were reallocated to the newly created commands: Canada Command, Canadian Expeditionary Force Command, Canadian Operational Support Command and Canadian Special Operations Forces Command.

Courts Martial By Rank

	2005-2006	2006-2007
Private and Corporal (includes Master-Corporal*)	33	47
Sergeant to Chief Warrant Officer	4	8
Officer	3	13
Other	0	0
Total	**40**	**68**

**Master Corporal is not a rank. It is an appointment pursuant to QR&O article 3.08.*

ANNEX G

Appeals
Year in Review – Statistics:
1 April 2006 - 31 March 2007

Appeals Reporting Period 1 April 2006 - 31 March 2007

Appeals Heard

Court	2005-2006	2006-2007
Court Martial Appeal Court of Canada	4	3
Supreme Court of Canada	0	0
Total	**4**	**3**

Appeals by Party

Status of Appellant	2005-2006	2006-2007
Appeals by Crown	0	0
Appeals by Offender	4	3
Total	**4**	**3**

Note: In 2 cases, the Crown cross-appealed: R. v. Dunphy, CMAC 491; R. v. Parsons, CMAC-492.

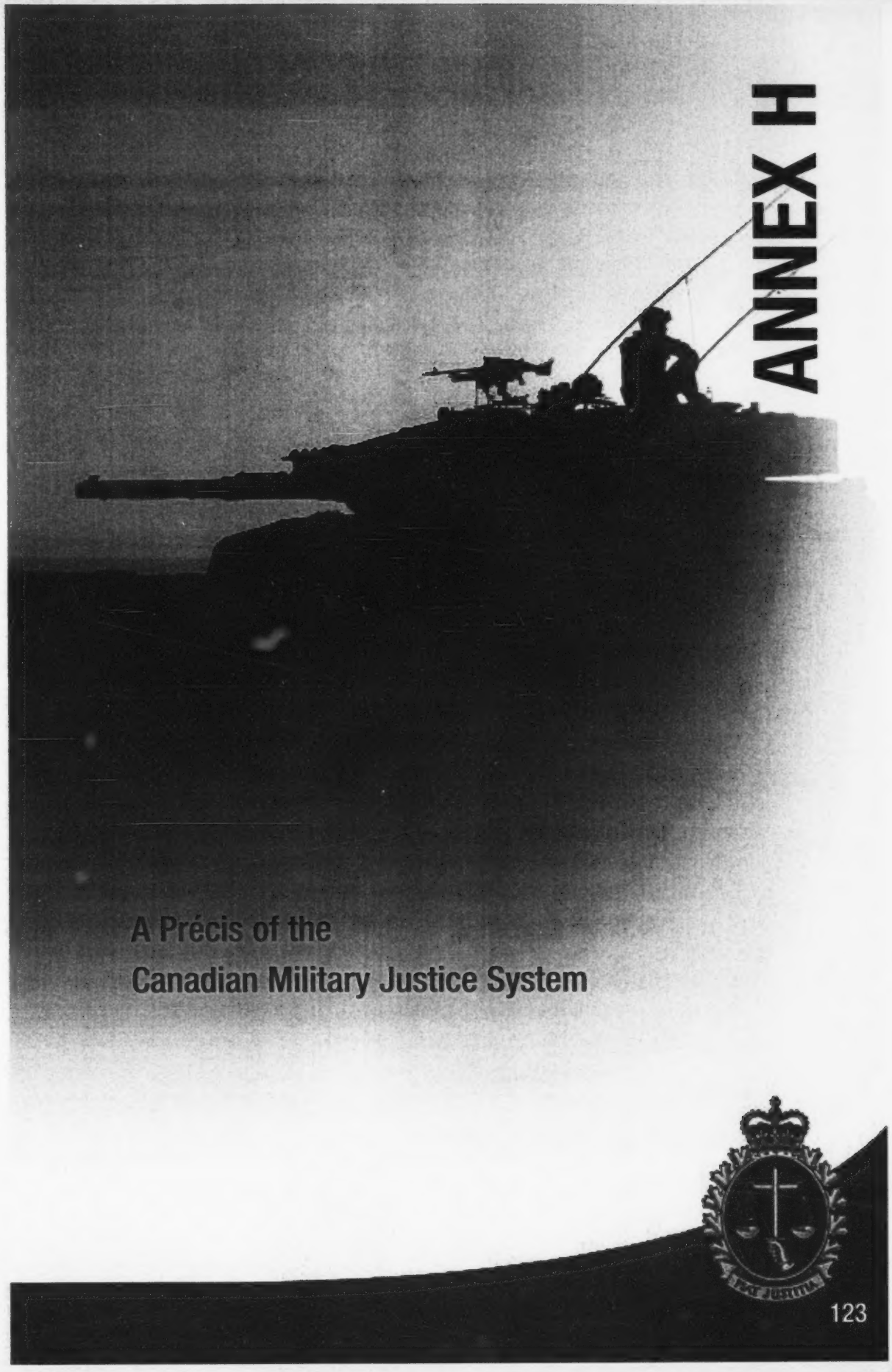
Nature of Appeal

Grounds	2005-2006	2006-2007
Finding	1	3
Sentence (severity and/or legality)	0	0
Finding and sentence	3	0
Cross-Appeal	0	2
Total	**4**	**5**

Disposition

	2005-2006	2006-2007
Upheld trial decision	1	1
Stay of Proceedings	0	1
Overturned trial decision in whole or part	3	1
Total	**4**	**3**

Note: For statistics relating to prior years, refer to previous JAG Annual Reports.



ANNEX H

A Précis of the Canadian Military Justice System

The Purpose of a Separate Military Justice System

In 1982, the *Canadian Charter of Rights and Freedoms (Charter)* expressly recognized the existence of a separate yet parallel system of military justice within the Canadian legal system. Subsection 11(f) of the *Charter* states that any person charged with an offence has the right to trial by jury "except in the case of an offence under military law tried before a military tribunal".

The Supreme Court of Canada has directly addressed the existence of a separate, distinct military justice system twice.[1] On both occasions, the court has upheld the requirement for a separate military justice system in the Canadian Forces (CF). In *R. v. Généreux*, [1992] 1 S.C.R. 259 at 293, the Supreme Court of Canada stated the rationale for keeping the military justice system distinct from the civilian criminal justice system:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military.

[1] *MacKay v. The Queen*, [1980] 2 S.C.R. 370, and *R. v. Généreux*, [1992] 1 S.C.R. 259.

The Constitutional and Legislative Framework of the Canadian Military Justice System

Using its constitutional authority,[2] the Parliament of Canada enacted the *National Defence Act* (NDA), which, among its provisions, sets out the organization of the Department of National Defence (DND), the CF and the Canadian military justice system (including the establishment of courts martial and the court martial appeal court), and authorizes the Chief of the Defence Staff (CDS) to issue orders and instructions to give effect to the decisions and the directions of the Government of Canada and the Minister of National Defence.[3] The NDA authorizes the Governor in Council and the Minister of National Defence to make regulations for the organization, training, discipline, efficiency, administration and good government of the CF and, generally, for carrying the purposes and provisions of the NDA into effect. The NDA authorizes the creation of the *Queen's Regulations and Orders* (QR&O), Canadian Forces Administrative Orders (CFAO), and the Defence Administrative Orders and Directives (DAOD).

Volume II of QR&O, which covers disciplinary matters, prescribes in greater detail the jurisdiction, organization and procedures of the Canadian military justice system. Orders and instructions dealing with disciplinary matters may be issued at any level of the chain of command.[4] All members of the CF have a duty to be familiar with the orders and instructions issued by their chain of command.[5] Failure to comply with such orders and instructions can lead to charges under the Code of Service Discipline (contained in the NDA), which are disposed of in the military justice system.

[2] *Constitution Act*, 1867, s. 91(7). Under the Canadian Constitution, the Parliament of Canada has exclusive authority to make laws relating to the "militia, military and naval service and defence". Consequently, Canadian constitutional law accords to the federal Parliament the right to make laws and regulations relating to military justice.

[3] NDA section 18(2).

[4] QR&O articles 4.12 and 4.21.

[5] QR&O articles 4.02 and 5.01.

Notwithstanding Parliament's authority to create and administer a military system of justice, the federal government is not immunized from complying with other constitutional laws, including the protections afforded by the *Charter*. As Canadian citizens, CF members are entitled to enjoy all the rights and freedoms guaranteed by the *Charter*.

The Military Justice System

Code of Service Discipline

Comprising approximately 50 percent of the NDA,[6] the Code of Service Discipline is the foundation of the Canadian military justice system. It sets out disciplinary jurisdiction and describes service offences, punishments, powers of arrest, and the organization and procedures for service tribunals, appeals and post-trial review.

Jurisdiction

The Code of Service Discipline applies to all CF members and, in certain circumstances, to civilians who may become subject to Canadian military law, for example, when accompanying a CF unit on service or active service.[7]

Not all offences can be charged and tried in the military justice system.[8] The CF has no jurisdiction to try any person charged with having committed, in Canada, the offences of murder, manslaughter, or any offence under sections 280, 282 and 283 of the *Criminal Code* of Canada.[9]

When a person subject to the Code of Service Discipline commits an offence under the *Criminal Code* or other federal law, the NDA extends jurisdiction

[6] Pursuant to section 2 of the NDA, the Code of Service Discipline consists of Part III of the NDA.

[7] NDA section 60(1) and QR&O article 102.09. The complete list of persons subject to the Code of Service Discipline appears in sections 60–65 of the NDA and QR&O Chapter 102.

[8] NDA section 70.

[9] Sections 280–283 of the *Criminal Code* relate to the abduction of children from a parent or guardian.

to deal with the matter in the military justice system.[10] Similarly, jurisdiction under the NDA may also be extended when an offence is committed contrary to foreign law.[11]

Service Offence

A "service offence" is an offence under the NDA, the Criminal Code or any other act of Parliament committed by a person while subject to the Code of Service Discipline. The Code of Service Discipline also includes several service offences that are unique to the profession of arms,[12] such as: misconduct in the presence of the enemy, mutiny, disobedience of a lawful command, desertion, absence without leave, and conduct to the prejudice of good order and discipline.

Limitation Periods

Generally, a person who is subject to the Code of Service Discipline at the time of the alleged commission of an offence continues to be liable to be charged, dealt with and tried at any time under the Code of Service Discipline.[13] This rule has two exceptions however. The first exception arises when the act or omission that constitutes the offence would have been subject to a limitation period had it been dealt with other than under the Code of Service Discipline; in such a case, that limitation period applies.[14] For example, if the act or omission constituted an offence under the *Criminal Code* or other federal or foreign law, then in this circumstance, any limitation period applicable to the offence in the civilian justice system applies. The second exception relates to summary trials. A summary trial must begin before one year has elapsed after the day when the offence is alleged to have been committed.[15]

[10] Under section 130 of the NDA, such offences may become service offences.

[11] Under section 132 of the NDA, an offence committed by a person subject to the Code of Service Discipline under the law of a foreign country while outside Canada in that foreign country may also be dealt with as a service offence.

[12] NDA sections 73–129.

[13] NDA sections 60(2) and 69.

[14] NDA section 69(a).

[15] NDA section 69(b).

Process of Laying Charges

Where a complaint is made or where there are other reasons to believe that a service offence may have been committed, an investigation shall be conducted to determine whether there are sufficient grounds to lay a charge.[16] A complaint can usually be directed to a commanding officer or to the Military Police.

Investigations

Investigations can be conducted by one of three groups. The type of disciplinary investigation, and the entity responsible for it, is determined by the nature of the offence alleged and the gravity or sensitivity of the matter.

Canadian Forces National Investigation Service (CFNIS) Investigation – The CFNIS operates to provide independent criminal investigation services in support of the military justice system. It will investigate if an alleged offence is of a serious or sensitive nature. Any one of the following circumstances can bring a matter within the ambit of the "serious and sensitive" standard:

- when an offence is classified as indictable under the *Criminal Code* of Canada or other federal legislation;
- when a matter involves a senior officer (rank of major or above, or a civilian equivalent) or commanding officer as either the subject of investigation or victim; or
- when an offence arises out of a breached relationship of trust.

Moreover, when the CFNIS conducts an investigation, its investigators have the authority to lay charges.

Military Police Investigation – Where an alleged offence does not meet the serious or sensitive standard, or where the CFNIS has waived their jurisdiction, the Military Police will normally assume investigative responsibilities. Matters investigated by the Military Police will be referred to the person's unit for review and, where appropriate, the laying of charges.

[16] QR&O article 106.02.

Unit Investigation – Alleged offences typically involving only a minor breach of discipline can be dealt with by way of unit investigation.

Investigation Process

Regardless of the form of disciplinary investigation undertaken, an investigator shall, as a minimum, collect all reasonably available evidence bearing on the guilt or innocence of the person who is the subject of the investigation. Where appropriate, an investigation can involve:

- interviewing witnesses;
- taking statements;
- gathering physical evidence; and
- extending an opportunity to the subject of the investigation to make a statement.

The investigator may seek legal advice at any point during the investigation; but there is no obligation to do so.

Charging Process

A "charge" is a formal accusation that a person subject to the Code of Service Discipline has committed a service offence. A charge is laid when it is reduced to writing in a Charge Report (Part I of a Record of Disciplinary Proceedings (RDP) form) and signed by a person authorized to lay charges.[17]

The following persons may lay charges under the Code of Service Discipline:

- a commanding officer;
- an officer or non-commissioned member authorized by a commanding officer to lay charges; and
- an officer or non-commissioned member of the Military Police assigned to investigative duties with the CFNIS.[18]

[17] QR&O article 107.015(2).
[18] QR&O article 107.02.

To lay a charge there must be an actual belief on the part of the person laying a charge that the accused has committed the alleged offence and that belief must be reasonable. A "reasonable belief" is a belief that would lead any ordinary prudent and cautious person to the conclusion that the accused probably committed the offence alleged.[19]

Legal Advice

Prior to laying a charge, the charge laying authority is required to obtain legal advice if:

- the charge cannot be tried summarily;
- the charge would give rise to a right to elect trial by court martial; or
- the offence is alleged to have been committed by an officer or non-commissioned member at or above the rank of warrant officer or petty officer first class.[20]

Legal advice at this stage in the process assists the charge laying authority in the exercise of charge laying discretion and as such is generally focused on whether or not the basic legal elements exist to allow the charge layer to form a reasonable belief that an offence has been committed. Advice will usually pertain to:

- the sufficiency of the evidence;
- whether or not the circumstances warrant a charge being laid; and
- the determination of an appropriate charge.

Where the CFNIS conducts an investigation, a prosecutor with the Canadian Military Prosecution Service (which is supervised by the Director of Military Prosecutions (DMP)) provides the necessary legal advice. In all other cases, the unit legal adviser provides legal advice.

[19] See Note to QR&O article 107.02.

[20] QR&O article 107.03. Generally speaking, it is the rule rather than the exception to seek legal advice before laying charges. Effectively, legal advice must always be obtained, unless a person of or below the rank of sergeant or petty officer second class is to be charged with one of five minor offences listed in QR&O 108.17.

Again, in all but the most minor of cases, legal advice must be sought from the unit legal adviser prior to making the decision of whether or not to proceed with a charge.[21] The commanding officer shall only proceed with charges if, in addition to having a reasonable belief that the accused committed the alleged offence, he or she is satisfied that there is sufficient evidence to put the accused on trial.

The Decision to Proceed with a Charge

Once a charge has been laid, the charge laying authority must refer it to either:

- the accused person's commanding officer;
- the commanding officer of the base or unit in which the accused was present when the charge was laid; or
- another officer within the unit who has been authorized by the commanding officer to deal with charges under the Code of Service Discipline.[22]

An officer, to whom a charge has been referred, must then decide whether to proceed with the charge or not. A commanding officer or superior commander who decides not to proceed with a charge laid by the CFNIS must communicate that decision with reasons to the CFNIS.[23] If, after reviewing the decision and reasons, the CFNIS considers that the charge should go forward, the CFNIS may refer the charge directly to a referral authority for disposal, who must then refer the charge to the DMP.[24] When circumstances warrant, investigators of the Military Police and the CFNIS may also lay charges in the civilian courts.[25]

Where a commanding officer, superior commander, or officer with delegated powers decides to proceed with a charge, the charge shall be dealt with in

[21] QR&O article 107.11.

[22] QR&O article 107.09(1)(a).

[23] QR&O article 107.12(1).

[24] QR&O article 107.12(3).

[25] Where concurrent jurisdiction does exist, charges may be laid by military authorities under the Code of Service Discipline or in the civilian courts.

accordance with the procedures prescribed by regulations contained in Volume II of QR&O. Ultimately, the CO can decide not to proceed with the charge, arrange for the accused to be tried by summary trial or refer the charge, which begins a process whereby the accused may consequently be tried by court martial.

The Two Tiers of the Military Justice System

The military justice system has a two-tiered tribunal structure that includes the summary trial system (where most disciplinary matters are dealt with) and the more formal court martial system. The term "service tribunal"[26] means either a summary trial or a court martial.[27] The regulations outline procedures for the trial of a matter by summary trial, as well as procedures for referral of charges for trial by court martial.

Summary Trials

The summary trial remains the most commonly used form of service tribunal in the military justice system. The purposes of a summary trial are as follows:

- to provide prompt, fair justice in respect of minor service offences; and
- to contribute to the maintenance of military discipline and efficiency in Canada and abroad, in peacetime and during armed conflicts.[28]

Once jurisdiction exists to conduct a summary trial,[29] it may be held wherever the unit is located, whether it is in garrison, in an exercise area or

[26] NDA section 2.

[27] For a detailed, comprehensive overview of the military justice system, see the JAG publication *Military Justice at the Summary Trial Level* (downloadable from www.forces.gc.ca/jag).

[28] QR&O article 108.02.

[29] Summary trial jurisdiction over an accused is not automatic; it depends on several statutory and regulatory factors including: fitness of the accused to be tried, the status and rank of the accused and of the presiding officer, the nature of the charges, the length of time elapsed between the laying of the charges and the first day of trial, the interests of justice and discipline, the nature of the punishment that may be imposed on the accused should a guilty finding be made and, if applicable, the election of the accused to be tried summarily. For a detailed consideration of jurisdiction, see NDA sections 60, 69, 70, 163 and 164; and QR&O articles 108.05, 108.06, 108.07, 108.09, 108.10, 108.12, 108.125, 108.16, 108.17 and 119.02.

deployed abroad. Generally, summary trials are conducted across Canada, at sea in Her Majesty's Canadian ships, and in various locations during operations abroad.

When a CF member is charged with an offence under the Code of Service Discipline, the summary trial process usually permits the case to be tried and disposed of in the unit, by members of the unit. Summary trials are presided over by commanding officers,[30] delegated officers[31] or superior commanders.[32] Before conducting a summary trial, however, the presiding officer must (in most circumstances) be trained and certified in the administration of the Code of Service Discipline in accordance with the curriculum established and taught by the Directorate of Law/Training on behalf of the JAG.[33]

The procedures at a summary trial are straightforward and the powers of punishment are limited in scope. This restriction on the available punishments at summary trial reflects both the minor nature of the offences that may be tried at that level, and the intention that presiding officers impose punishments that are primarily corrective in nature.

During a summary trial, the accused is provided with an assisting officer from the unit. The primary functions of an assisting officer are to assist the accused in the preparation of his or her case and to assist the accused during the trial to the extent desired by the accused.

In addition, before the accused makes an election under article 108.17 *(Election To Be Tried by Court Martial)*, the assisting officer shall ensure that the accused is aware of the nature and gravity of any offence with which the accused has been charged and the differences between trial by court martial and trial by summary trial.

[30] NDA section 163(1)(a). Commanding officers may try accused persons who are either an officer cadet or below the rank of warrant officer.

[31] NDA section 163(4) and QR&O 108.10. Delegated officers appointed by the com manding officer must be of the rank of captain or above. They may only try an accused below the rank of warrant officer, and may try only a limited number of minor offences.

[32] NDA section 164(1)(a). Superior commanders may try officers below the rank of lieutenant-colonel or non-commissioned members above the rank of sergeant.

[33] QR&O article 101.09; effective 1 April 2000—exceptions only for "urgent operational requirements."

Although the summary trial is still the overwhelmingly predominant form of service tribunal, not all service offences can be handled summarily. QR&O lists the offences that a commanding officer may try summarily.[34] The more serious offences, including most *Criminal Code* offences charged pursuant to section 130 of the NDA, must be tried by court martial.

Review of Summary Trials

All offenders convicted at summary trial have the right to apply to the presiding officer's next superior officer in the disciplinary chain of command for a review of the findings, the punishment imposed,[35] or both.[36] The findings and punishment imposed at summary trial may also be reviewed on the independent initiative of a review authority.[37] Review authorities acting under QR&O article 108.45 must obtain legal advice before making any determination on requests for review.[38]

Offenders convicted at summary trial may also request judicial review from the Federal Court or from the Superior Court in any province.[39]

Right to be Tried by Court Martial

A significant aspect of the recent reforms was the expansion of the right of the accused to choose between summary trial and trial by court martial. Now, the accused has the right to elect trial by court martial in the vast majority of cases. In effect, the presiding officer must offer an election

[34] QR&O article 108.07. See QR&O article 108.125 for offence jurisdiction for summary trial by superior commander, and QR&O article 108.10 for offence jurisdiction for summary trial by delegated officer.

[35] For a more detailed explanation of the powers of punishment in the summary trial system, see QR&O articles 108.24, 108.25 and 108.26.

[36] QR&O article 108.45.

[37] NDA section 249 and QR&O article 116.02.

[38] QR&O article 108.45(8).

[39] *Federal Court Act*, R.S.C. 1985, c. F–7, sections 18 and 18.1.

unless the accused is facing only a "minor disciplinary" charge.[40] The QR&O specify when an accused has the right to elect to be tried by court martial, and under what circumstances an accused is not provided the option to choose. Generally, there are two instances where the option to choose is unavailable:

- where the charge laid is "minor" and in the judgement of the officer who will conduct the summary trial, any of the following penalties would not be appropriate upon a finding of guilt:
  - detention;
  - reduction in rank;
  - a fine in excess of 25 percent of monthly basic pay;
  - where the charge is for a serious offence under the Code of Service Discipline (e.g. negligent performance of duty, or some offences capable of being categorized as indictable under the *Criminal Code*) or the accused person is of the rank of lieutenant-colonel or higher, a trial by court martial is the only available option.

Where the accused has the right to be tried by court martial, the accused must be informed of that right. The accused must also be given a reasonable period of time to decide whether to elect to be tried by court martial, and to consult legal counsel with respect to the election.[41]

[40] "Minor disciplinary" charges resulting in a denial of the option to elect include the following sections of the NDA: 85 (insubordinate behaviour), 86 (quarrels and disturbances), 90 (absence without leave), 97 (drunkenness), or 129 (conduct to the prejudice of good order and discipline). When charges are laid under section 129, the right of election may be denied only when the offence relates to military training; maintenance of personal equipment, quarters or work space; or dress and deportment.

[41] QR&O articles 108.17 and 108.18. Legal officers in the Directorate of Defence Counsel Services are available to provide legal advice with respect to the making of the election. This service is provided at no expense to the accused, and is normally provided by telephone.

If a matter is to proceed by way of summary trial, in most circumstances the summary trial cannot be presided over by a commanding officer or superior commander who was also responsible for the investigation or laying of the charge for that particular accused.

Referral to Court Martial

When the type of charge requires trial by court martial, an accused has elected to be tried by court martial, or the commanding officer has determined that due to the nature of the offence the matter is most appropriately dealt with by court martial, the charge is referred to a referral authority. The term "referral authority" applies only to those specific officers who have been legally empowered to refer a charge to the DMP for the purposes of determining whether a matter warrants trial by court martial.

When making a referral to the DMP, a referral authority essentially represents the interests of the CF, which will be reflected in any recommendations accompanying a referred charge. Under the regulations, the following officers are referral authorities:

- the Chief of Defence Staff; and
- any officer having the powers of an officer commanding a command.

Upon receipt of an application to proceed with a charge, the referral authority must:

- forward the application to the DMP, adding any recommendations regarding the disposition of the charge that are deemed appropriate (including any recommendation to proceed or not proceed with a charge); or
- direct a commanding officer or superior commander to try the accused by summary trial on the existing charges, but only in circumstances where the referring officer had referred the charge because he or she believed his or her powers of punishment were not adequate to try the accused by summary trial and the referral authority does not share this opinion.

Thus in most cases, when a charge has been referred to a referral authority, he or she must forward the charge to the DMP, with any recommendations that the officer considers appropriate.

Role Of DMP In Court Martial Process

The DMP is responsible for:

- deciding whether a particular charge is suitable for trial by court martial; and
- conducting prosecutions at courts martial.

Upon receipt of a referral, the DMP initially undertakes a review of the charge. Two main issues are considered:

- the sufficiency of the evidence required to demonstrate a reasonable prospect of conviction in respect of the charges laid or yet to be laid; and
- where there is sufficient evidence, whether or not the public interest and the interests of the CF require the initiation of a prosecution.

Following a review of the charge, the DMP will determine whether or not a charge should be dealt with at court martial and will notify the referral authority, commanding officer, and the accused of this decision. Where it is decided not to proceed with the court martial, the DMP may refer the charge back to an officer having summary trial jurisdiction if:

- the offence is one which may be tried at summary trial; and
- the accused has not elected to be tried by court martial.

On the other hand, where the decision is made to pursue a charge, the DMP will prefer the charge by preparing and signing a charge sheet and refer the charge to the Court Martial Administrator, who will then convene a court martial. In addition, the DMP can modify charges or prefer any other charges supported by evidence.

Courts Martial

The court martial, a formal military court presided over by a military judge, is designed to deal with more serious offences, and is conducted in accordance with rules and procedures similar to those followed in civilian criminal courts. Like summary trials, courts martial may be held anywhere in the world. Statutorily, courts martial have the same rights, powers and privileges as a superior court of criminal jurisdiction with respect to all "matters necessary or proper for the due exercise of its jurisdiction,"[42] including: the attendance, swearing and examination of witnesses; the production and inspection of documents; and the enforcement of its orders.

At a court martial, the prosecution is conducted by a legal officer from the Office of the DMP. The accused is entitled to be represented free of charge by a legal officer from the Directorate of Defence Counsel Services (DDCS)[43] or, at his or her own expense, by a civilian lawyer. CF members who meet the qualifying criteria may also take advantage of provincial Legal Aid programs.

Types of Court Martial

The NDA provides four types of court martial:

- General Court Martial;
- Disciplinary Court Martial;
- Standing Court Martial; and
- Special General Court Martial.

The General Court Martial and the Disciplinary Court Martial each comprise a military judge and a panel of CF members. The panel of CF members is roughly analogous to a jury in a civilian criminal court. In a General Court Martial, the panel is composed of five members and in a Disciplinary Court Martial, the panel is composed of three members.[44] When the accused is an

[42] NDA section 179.
[43] QR&O article 101.20.
[44] NDA sections 167(1) and 170(1).

officer, the court martial panel consists entirely of officers. When the accused is a non-commissioned member, the panel at a General Court Martial must include two non-commissioned members at or above the rank of warrant officer or petty officer first class. The panel at the Disciplinary Court Martial of a non-commissioned accused must include one non-commissioned member at or above the rank of warrant officer or petty officer first class.[45] At both the General Court Martial and the Disciplinary Court Martial, the panel makes the finding on the charges (i.e. guilty or not guilty) and the military judge makes all legal rulings and imposes the sentence.

The Standing Court Martial and the Special General Court Martial differ in name and function, but not in composition; both are conducted by a military judge sitting alone,[46] who makes the finding on the charges and imposes a sentence if the accused is found guilty. The rank or status of the accused, the nature of the offence, and the powers of punishment available to the various types of court martial are all factors considered in determining which type of court martial is appropriate in a specific case.

Appeal of a Court Martial Decision

Generally speaking, decisions made at courts martial may be appealed to the Court Martial Appeal Court of Canada (CMAC), a civilian court composed of Federal Court and Superior Court judges.[47] The CMAC may sit and hear appeals at any place.

Under the NDA, both an accused tried by court martial and the Minister of National Defence may appeal to the CMAC.

CMAC decisions may be appealed to the Supreme Court of Canada. Such appeals may be made on any question of law on which a judge of the CMAC dissents, or on any question of law if leave to appeal is granted by the Supreme Court of Canada.[48]

[45] NDA sections 167(7) and 170(4).
[46] NDA sections 174 and 177.
[47] See sections 159.9, 234, 235, 238 to 243 and 248.2 to 248.9 of the NDA.
[48] NDA section 245.

When a person has delivered a Notice of Appeal under section 230 or 245 of the NDA, he or she may apply to the Appeal Committee, established by the Governor in Council through regulation,[49] to be represented on the appeal, free of charge, by a lawyer appointed by the DDCS. When both members of the Appeal Committee determine that the applicant's appeal has professional merit, the committee shall approve the provision of legal counsel by the DDCS.[50] The professional merit standard requires not only a reasonable chance of success on the particular legal issues raised, but also a reasonable likelihood that should the court allow the appeal, the decision will alter the court martial findings or sentence.

Before the establishment of the Appeal Committee, only accused persons who were respondents to appeals filed by the Crown were entitled to be represented by a legal officer at public expense.[51] This regulatory provision now extends the same opportunity to persons initiating an appeal which is determined to have professional merit.

Ancillary Repercussions To A Member's Career

Apart from potential disciplinary action or penal sanctions under the Code of Service Discipline, administrative action may also be initiated by the chain of command.

When a CF member is faced with a charge under the Code of Service Discipline, a commanding officer must consider the consequences of leaving the accused in the workplace, or relieving him or her of the obligation to perform military duties. Whatever administrative course of action is contemplated, it must be appropriate, taking into account: the specific offence, the circumstances of the accused, the best interests of the unit, and the operational requirements of the CF as a whole. In essence, the rights of the individual involved must be weighed against the public interest.

[49] QR&O article 101.21.
[50] QR&O article 101.21(6).
[51] QR&O article 101.20(2)(g).

When administrative measures are temporary in nature, a member's status will be re-evaluated once military justice proceedings are concluded. Depending upon the circumstances, however, long-term administrative measures may be imposed after a final disposition of the charges. Such measures can range from recorded warnings or counselling and probation, to the most serious measure, release from the CF.

Public Access to Charging Documents

The CF has a process similar to that used by civilian criminal courts to permit public access to the charging documents in the Unit Registry of Disciplinary Proceedings.[52] Under the civilian court system, registries supply basic charging documents to requesters who give the registry staff sufficient information to identify the record sought.

Each CF unit is required to establish and maintain a Unit Registry of Disciplinary Proceedings. Anyone can request a copy of a specific RDP by sending the commanding officer of the originating unit a written request containing sufficient information to allow the RDP to be identified (e.g., a specific type of offence, or the name of an accused). Upon receipt of such a request, the commanding officer must send the requester a copy of the RDP held on the unit's Registry of Disciplinary Proceedings, unless release of the RDP is prohibited for one of the reasons set out in the regulation.[53]

This streamlined process is designed to increase public access to the basic charging documents and key decisions in the military justice system. This material is also available through the *Access to Information Act* process, which must be used when the requester lacks sufficient identifying information or the commanding officer is prohibited from releasing the RDP for a reason set out in the regulation.

[52] QR&O article 107.14.
[53] QR&O article 107.16.

Glossary of Terms and Abbreviations

ADM (Fin CS) .... Assistant Deputy Minister (Finance and Corporate Services)
ADM (IM) ..... Assistant Deputy Minister (Information Management)
ADM (Mat) ..... Assistant Deputy Minister (Materiel)
AJAG ..... Assistant Judge Advocate General
AJAG CWO..... Assistant Judge Advocate General Chief Warrant Officer
AWOL..... Absence without leave
BOI..... Board of Inquiry
CA..... Court of Appeal
Canada COM..... Canada Command
CANOSCOM ..... Canadian Operational Support Command
CANSOFCOM ..... Canadian Special Operations Forces Command
CAS ..... Chief of the Air Staff
CBA ..... Canadian Bar Association
CC..... Criminal Code
CDA..... Canadian Defence Academy
CDS..... Chief of the Defence Staff
CDSA..... Controlled Drugs and Substances Act
CEFCOM..... Canadian Expeditionary Force Command
CF..... Canadian Forces
CFAO..... Canadian Forces Administrative Orders
CFMLC..... Canadian Forces Military Law Centre
CFNIS..... Canadian Forces National Investigation Service
CIMP..... Comprehensive Information Management Program
CLS ..... Chief of the Land Staff
CM ..... Court Martial
CMA ..... Court Martial Administrator
CMAC ..... Court Martial Appeal Court of Canada
CMJ..... Chief Military Judge
CMP..... Chief of Military Personnel
CMPS..... Canadian Military Prosecution Service
CMRS..... Court Martial Reporting System
CMS..... Chief of the Maritime Staff
CO..... Commanding Officer
Cpl..... Corporal

CPO1 ..... Chief Petty Officer 1st Class
CSD ..... Code of Service Discipline
CWO ..... Chief Warrant Officer
DAOD ..... Defence Administrative Orders and Directives
DCS ..... Defence Counsel Services
DCM ..... Disciplinary Courts Martial
DDCS ..... Director of Defence Counsel Services
DDMP ..... Deputy Director of Military Prosecutions
DJA ..... Deputy Judge Advocate
DJAG ..... Deputy Judge Advocate General
DJAG/COS ..... Deputy Judge Advocate General/Chief of Staff
DJAG/MJ&AL ..... Deputy Judge Advocate General/ Military Justice and Administrative Law
DJAG/Ops ..... Deputy Judge Advocate General/Operations
DJAG/Reg Svcs ..... Deputy Judge Advocate General/Regional Services
DLAW/MIL PER ..... Directorate of Law/Military Personnel
DLAW/MJP&R ..... Directorate of Law/Military Justice Policy and Research
DLAW/OPS ..... Directorate of Law/Operations
DLAW/SLA ..... Directorate of Law/Strategic Legal Analysis
DLAW/T ..... Directorate of Law/Training
DMP ..... Director of Military Prosecutions
DNA ..... Deoxyribonucleic acid
DND ..... Department of National Defence
DND/CF LA .. Department of National Defence/Canadian Forces Legal Advisor
D Pers AR ..... Directorate of Personnel/Applied Research
FCC ..... Federal Court of Canada
GIC ..... Governor in Council
HTML ..... Hypertext Mark-up Language
IAW ..... In Accordance With
JAG ..... Judge Advocate General
JTF 2 ..... Joint Task Force 2
LCol ..... Lieutenant-Colonel
LOIT ..... Legal Officer Intermediate Training
MCpl ..... Master Corporal

MND ..... Minister of National Defence
MRE ..... Military Rules of Evidence
NCM ..... Non-Commissioned member
NDA ..... National Defence Act
NDHQ ..... National Defence Headquarters
OPME ..... Officer Professional Military Education
POCT ..... Presiding Officer Certification Training
PORT ..... Presiding Officer Re-certification Training
Q.C ..... Queen's Counsel
QR&O ..... Queen's Regulations and Orders for the Canadian Forces
RDP ..... Record of Disciplinary Proceedings
RMP ..... Regional Military Prosecutor
SCC ..... Supreme Court of Canada
SCM ..... Standing Courts Martial
SI ..... Summary Investigations
SOIRA ..... Sex Offender Information Registration Act
URDP ..... Unit Registries of Disciplinary Proceedings
VCDS ..... Vice Chief of the Defence Staff